No. 479. 181.

Brief of Peak for Appts.

Supreme Court of the United States.

Filed Feb. 12, 1898.

October Term, 1897.

J. C. ANDERSON and others, *Appellants*,

vs.

THE UNITED STATES. } No. 479.

Statement, Specification of Errors, and Brief and Argument for Appellants.

R. E. BALL,
With whom are I. P. RYLAND,
JNO. L. PEAK,
Solicitors for Appellants.

HORN PRINTING CO., 109-111 E. Missouri Ave., Kansas City, Mo. Telephone 1758.

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vs.
THE UNITED STATES.

No. 479.

STATEMENT.

On June 7th, 1897, the United States, by the district attorney, acting under the authority of the attorney-general, filed its bill of complaint against the appellants in the circuit court of the United States for the Western district of Missouri, attempting to charge the appellants with having violated the act of congress of July 2nd, 1890, entiled, "An act to protect trade and commerce against unlawful restraints and monopolies."

The bill charges that the appellants are all members of a voluntary unincorporated association known as "The Traders Live Stock Exchange;" that the government of the exchange is vested in a board of eight directors, who are members, and the business of the exchange is carried on by this board at the Kansas City stock yards, situated in Kansas City, Missouri, and Kansas

City, Kansas, and in a building owned by the Kansas City Stock Yards Company, which building is so located that half of it is in Missouri and half of it in Kansas; that about half of the appellants transact business and have offices in said building in Kansas and about half in Missouri; that the Kansas City Stock Yards Company own and operate said stock yards located in Jackson county, Missouri, and Wyandotte county, Kansas, being on both sides of the state line, said yards consisting of yards, pens and chutes, railway tracks, sheds, scales, buildings and other means and appliances for receiving, yarding, feeding selling, purchasing and shipping cattle and other live stock; that the board and officers of defendant exchange transact its business partly in Missouri and partly in Kansas; that the Kansas City stock yards is a public market and next to that of Chicago, Illinois, is the largest in the world; that live stock is shipped to said market from the states of Kansas, Nebraska, Colorado, Texas, Missouri, Iowa and Arkansas, and from the territories of Arizona and New Mexico; that large numbers of the stock so received are for sale upon said market and many head are there sold to buyers who reside in other states and territories and who reship to said states and territories, and that vast numbers of the stock so received at the Kansas City yards are shipped from the aforesaid states and territories to Chicago and other Eastern markets, that such stock are shipped under contracts whereby the shipper is permitted to unload at the Kansas City yards for rest, water and feed with the privilege of selling at Kansas City, if prices justify it and the shipper chooses to sell, and that many head of such cattle are sold on the Kansas City market. That a large portion of the live stock, cattle, hogs and sheep are sold to various

packing houses located in Kansas City, Missouri, and Kansas City, Kansas, and large numbers are sold for reshipment to Eastern markets and for export to London and other European markets.

It is then alleged that the live stock so received at the Kansas City market constitute a part of interstate commerce between the various states and territories, particularly those above named.

It is then alleged that the United States has employed and stationed at these yards its inspectors, who inspect live stock.

It is then alleged that in the course of business at the yards, in buying, selling and handling cattle, the same are moved and shifted from that part of the yards in Missouri to that part in Kansas, and *vice versa*, according to the convenience of the stock yards company; that in the sale and reshipment of cattle some are sold and shipped from Missouri and some from Kansas, the loading pens and chutes being in both states and contiguous; that said yards furnish to owners, shippers and dealers in live stock, the only available means at that place for handling, selling and reshipping live stock, and the only available place and means within two hundred miles to the north, south and east, and more than thousand miles to the west for the exchange of interstate traffic in live stock between the states and territories named; that because the business at the yards is done on both sides of the state line, and in the course of doing it, the cattle are at times in Missouri and again in Kansas, the business is interstate commerce and can only be regulated and controlled by federal legislation.

The bill then charges that these appellants and divers other persons were, prior to March, 1897, engaged as speculators upon and at these yards, i. e., in buying upon the market, reselling

upon the same market, and reshipping to other markets in other states; that it is the daily custom and practice of appellants and their associates and others to buy and sell stock in Missouri which are at the time in pens on the Kansas side, and *vice versa*; and deliveries in such cases are made from pens in Missouri to those in Kansas, and *vice versa*; that all live stock shipped to said yards are received and sold by commission merchants to packing houses in Kansas City, Missouri, and Kansas City, Kansas, and said merchants sell large numbers of cattle to appellants and others who resell and reship the same.

It is then alleged that appellants have unlawfully entered into a contract, combination and conspiracy in restraint of trade and commerce among the several states and with foreign nations in this, to-wit: That they have unlawfully agreed, contracted, combined and conspired to prevent all other persons than members of the Traders' Live Stock Exchange from buying and selling cattle at said yards; that the commission merchants to whom cattle are consigned are not permitted and cannot sell to any buyer or speculator at said yards unless such purchaser be a member of the Traders' Exchange, and that appellants and each of them unlawfully and oppressively refused to purchase cattle or in any manner negotiate or deal or buy from any commission merchant who shall sell or purchase cattle from any speculator at said yards who is not a member of said exchange.

It is then alleged that by and through such agreement, combination and conspiracy, the business and traffic in cattle at said yards is interfered with, hindered and restrained, thus entailing extra expense and loss to the owner and placing an obstruction and embargo on the marketing of cattle shipped to said yards; that within three months

certain members, who had traded with speculators not members, had been fined, by the Exchange, and members had been fined who had traded with commission firms that dealt with speculators not members, (though there is no allegation as to what these members were fined for).

It is then alleged, by way of a deduction, that appellants had agreed, combined, conspired and confederated together in violation of the laws of the United States, and especially of Section 1, of the act of Congress of July 2nd, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," and have confederated, etc., to prevent and restrain all other persons not members of said Exchange in the prosecution of the business in which appellants are engaged, and that appellants' object and purpose was and is to prevent the sale by any commission firm to any buyer and speculator not a member of the Exchange.

The bill then prays for a dissolution of the Exchange and an injunction.

On July 1st, 1897, the defendants having entered appearance, application was made to the court for a preliminary injunction.

Numerous affidavits were filed by the government in support of the bill (Rec. 12–22) and by defendants contra (Rec. 22–42).

Doerr, for complainant, swore (p 12) that he was engaged at the yards in the same business as defendants; was not a member of the Exchange and that a number of commission firms had declined to do business with him on the ground, as stated by them, that they had been notified by officers and members of the Exchange not to deal with him.

Schmidt, for complainant, made affidavit to the same effect (p. 13).

Blanchard, for complainant, swore (p. 14) that he was a commission merchant; that the buyers on the market consisted of buyers for the packing houses, buyers who take orders for cattle to be reshipped to other markets, farmers and feeders who come from the country and buy on their own account, and "yard traders" or "speculators" who buy various classes of cattle on the market and speculate therein.

His affidavit also states that members of defendant organization had refused to deal with him while they thought he was having business transactions with a trader named Howard, not a member of defendant Exchange.

Greer, of the commission firm of Greer, Mills & Co., for complainant, swore (Rec. p. 15–16) that of the cattle received at the Kansas City stock yards, about 60 per cent are sold directly to local packers; that about 5 per cent are stopped only temporarily for feed and water and go through to other points without changing hands or being placed on the market; that of the remaining 35 per cent about 15 per cent are bought through local commission firms as agents for Eastern parties, about 20 per cent are sold to speculators and traders upon the Kansas City markets; that the members and officers of defendant Exchange had notified the firm of which affiant was a member not to sell cattle to certain speculators not members of said association; that on several occasions, about December, 1896, said firm did sell to traders not members of the said association; that thereupon said members did "boycott" said firm and refused to buy any cattle from said firm and refused to go into the lots and look at cattle consigned to said firm. He further states that of the class of cattle known as stockers and feeders, a great many are bought on said market by parties from the states

of Iowa, Illinois and other states; and that defendants bought all classes of cattle, many fat cattle, which they shipped to other markets.

The affidavits for complainant of Sanderson (pp.) 16, 17, 18), Crumbaugh (pp. 18, 19), Shelbon (pp. 19, 20), and Howard (p. 21) are substantially to the same effect as the foregoing, some of them being speculators and traders in the business at the time the affidavits were made and others claiming that they had been compelled to cease business, not because of any violence or intimidation by defendants or threats of such, but because commission men declined to furnish them with money to buy cattle, and did this for the reason that they preferred to retain the custom of defendants, which they could not do if they continued to patronize the affiants.

On behalf of appellants, Rust, superintendent of the Stock Yards Company, owner of the yards, in his affidavit (pp. 22, 23) gave statistics showing a continuous and enormous increase in the amount of business and number of cattle received, which followed the organization of the defendant exchange, and stated that "no embargo is placed upon anyone purchasing or desiring to purchase cattle at the stock yards, but a free and open market is afforded to all buyers and sellers. The members of the above named (defendant) organization are in the business of buying and selling cattle on the local market and are competitors among and against each other. Their organization in no way restrains or interferes with inter-state or local commerce, and the members do not monopolize or attempt to monopolize the business of buying and selling cattle at Kansas City."

Eubank, "order buyer" for appellants, testified (p. 23) that defendants are buyers and sellers of stockers and feeders on the local market; that

since the organization the market for that class of cattle had steadily improved until it had become during the past year the greatest in the United States or the world. He affirmed that defendant Exchange instead of being a hindrance or restraint, had improved the market, and that defendants had not monopolized, or attempted to, any part of the trade, and could not, if they tried, separately or together, control the market, either in supply or prices.

Substantially the same thing is sworn to by Payne, "order buyer" (p. 24).

The commission merchants who (see complainant's bill Rec. 7, side page 10) receive and sell in the first instance all cattle sold on this market, make affidavit through their respective cattle representatives (Rec. 25) that they are familiar with the operation and the effect on the market of the defendant association; that the members are exclusively engaged in the local trade of buying and selling; that the class of cattle in which defendants deal, namely stockers and feeders, is not handled by them exclusively and they do not attempt to monopolize the trade in such cattle and could not if they would do so; that the controlling prices from day to day are not determined by the yard traders; that the branch of business in which defendants are engaged has greatly and constantly improved since the organization of their Exchange; that the operations of the Exchange have greatly contributed to this improvement, and no hindrance or restraint of any kind has been put upon the market by defendants, and no purpose on their part, to the knowledge or belief of affiants, has ever existed to hinder, restrain or otherwise injure the market for any class of cattle.

It will be seen by comparison of the official list (Rec. pp. 27, 28, 29) of the commission mer-

chants, who are the consignees and original salesmen of all the cattle sold on this market, with the names of the firm representatives who signed this affidavit (Rec. pp. 25, 26, 27) and the affidavit of J. H. Waite and others (Rec. pp. 36 and 37), that all of the commission cattle salesmen, except three, made this oath, and one of the three, Greer, of Greer, Mills & Co., makes the affidavit already referred to (Rec. p. 15) in support of the bill.

The affidavit of W. H. Embry, president of the defendant Exchange, (Rec. p. 29) sworn to by the members of the executive board (Rec. p. 36) and that of various members, defendants, (Rec. pp. 37, 38) show: That the Exchange was organized in September, 1895, and was composed of persons engaged in the business of buying and selling cattle on the local market, who were and are known as yard traders; that prior to that time and since the Stock Yards Company, owner of the yards, assigned certain pens for the use of such traders in handling and disposing of the stock purchased by them, towhich pens cattle bought by any yard trader were and are delivered; that it was important and to the common interest of all persons engaged in the business of yard trading that the most favorable terms should be obtained from the Stock Yards Company as to the location of said pens and securing the best possible facilities for handling stock; that the pens so assigned for defendants' use are and were at the time of the filing of the bill in this case located in the State of Missouri; that at the time of the organization of said Exchange and since, certain persons, engaged in the business of yard trading, were guilty of disreputable business methods, for example, by purchasing culls and afterwards, by arrangement with some commission merchant, mingling them and having them sold with some other herd consigned

to such merchant, or by making purchases without means of payment, and being unable to resell on the same market day, refusing to consummate such purchase, and by other wrongful conduct to the scandal of the trade. That to obtain such advantage and facilities, in the common interest of all, as might be had by united effort, and to correct and prevent such abuses and to promote decent and honorable practices in the trade the association was formed and it had not and has not any other purpose; that (pp. 37, 38), defendants compete with each other, and with all buyers and sellers; that no attempt has been made to limit the number of yard traders to the existing membership of the Exchange, but any and all persons engaged in such business are welcome to become members on agreeing to the articles of association and rules; that (p. 31) defendants buy and sell the class of cattle known as stockers and feeders; that their said business is purely local to this market; that in quarantine cattle, subject to government inspection, cattle shipped through to other markets with or without the privilege of the Kansas City market, and fat cattle sold on the local market or shipped to other states or to foreign countries, defendants do not deal.

That of the volume of stockers and feeders sold on the Kansas City market, since the formation of the Exchange, not exceeding fifty per cent, in the judgment of affiants, have been handled by members of the exchange, and the rest by others; that except in rare instances, both purchases and sales made by defendant are made from and to persons not members; that when the Exchange provided by its rules, agreed to by the defendants, that no yard trader would be recognized, and buyers or sellers would not be employed, by members, unless such traders or employes

were members of the Exchange, it was meant and intended that those yard traders who did not approve of the objects of the association and of concerted action to obtain them, might go their independent way, but the Exchange would not countenance them nor be responsible for their methods.

The affidavit of Neff, publisher of the Daily Drovers Telegram, (pp. 38–42) shows that the Kansas City market for stockers and feeders had steadily grown during the past three years and the most phenomenal development was during the year immediately following the organization of the defendant Exchange, and that the growth of this trade continued in increased ratio up to the date of the application for this injunction. It shows that for more than a year a larger trade in this class of cattle was done at Kansas City than at Chicago and Omaha combined. It shows (p. 39) that on December 10th, 1896, (the date of the compilation of most of the statistics) there were in business at the yards 192 commission men employing 137 salesmen, and 182 yard traders employing 77 men, and exhibits in compact statement all the great features of an enormous industry.

The comprehensive and sufficiently detailed view, which the record shows of this great market and of the relation to it of the defendant association of few more than half of the number of men engaged as yard traders, was enough to cause the learned judge of the lower court to ignore many of the exaggerated, epithetic and plainly untrue averments of the bill. But attention is called to the fact that most, if not all, of such allegations are refuted by other more accurate statements of the bill itself. Thus when it is charged (Rec. p. 8) that defendants "have unlawfully agreed, contracted, combined and conspired to prevent all other persons than members of the Traders Live

Stock Exchange from buying and selling cattle upon the Kansas City market; and that the commission firm, person, partnership or corporation to whom said cattle are consigned at Kansas City as aforesaid is not permitted and cannot sell or dispose of said cattle at the Kansas City market as aforesaid to any buyer or speculator at the Kansas City stock yards unless said buyer or speculator is a member of the Traders Live Stock Exchange"—all this is refuted by the averment (Rec. p. 7) that all of the live stock shipped to and received at Kansas City is consigned to commission merchants, "which said commission firms take charge of said stock when it is received at said yards as aforesaid; that they sell said stock to the packing houses located at Kansas City, Missouri, and Kansas City, Kansas, and they sell large numbers of said cattle to these defendants and to other persons who resell and reship the same;" and it is refuted by all the affidavits filed for the government, in so far as they bear upon the subject, as well as by those filed on behalf of defendants (Greer, p. 15, etc.)

It must be taken from the record, without dispute, and doubtless was so taken by the court below, that the defendants have formed a voluntary association, not for pecuniary profit; that the members are local dealers each on his own account in the class of cattle known as stockers and feeders; that they have nothing to do with any kind of cattle until they buy them after they are placed on sale on the local market; that they resell on the same market; that they do not handle in the aggregate exceeding fifty per cent of the class of cattle in which they deal, which according to the estimate of Greer, *supra*, would be about ten per cent of the total number of cattle shipped to and marketed at Kansas City; that they are in con-

stant competition with each other, with packing house buyers, with representatives of commission firms, with order buyers, and with persons buying and selling on their own account and for others; that the market is a free and open one and they do not control it or attempt to control it, either in supply or prices, but on the contrary they have nothing to do with the supply, and are themselves controlled by the ruling prices which free competition creates; that there are a large number of yard traders not members of this association, rivals for trade of the defendants, who prefer to do business each independently rather than submit to the rules and regulations of an Exchange; that on information of some of these, this bill of complaint was founded; and finally that the gravamen of the complaint by the government is to be found in the charge of the bill. (Rec. p. 8). "And these defendants, and each of them, unlawfully and oppressively refuse to purchase cattle or in any manner negotiate or deal with or buy from any commission merchant who shall sell or purchase cattle from any speculator at the said Kansas City stock yards who is not a member of the Traders Live Stock Exchange."

The bill does not set forth the articles of association and rules, but they are annexed to and made part of the affidavit of President Embry (Rec. pp. 32–36). The rules here in question are:

Rule 10, (p. 34). "This Exchange will not recognize any yard trader unless he is a member of the Traders' Live Stock Exchange."

Rule 11, (p 35). "When there are two or more parties trading together as partners they shall each and all of them be members of this Exchange."

Rule 12, (p. 35, amended p. 36). "No member of this Exchange shall employ any person to buy or sell cattle unless such person holds a certificate of membership in this Exchange."

Rule 13, (p. 35). "No member of this Exchange shall be allowed to pay any order buyer or salesman any sum of money as a fee for buying cattle from or selling cattle to such party."

On July 19th, 1897, the circuit court, without filing any opinion, made the following decree, from which, in due time, this appeal was taken to the Circuit Court of Appeals for the Eighth Circuit (Rec. p. 43):

DECREE OF TEMPORARY INJUNCTION.

This cause having heretofore been heard and submitted, on the bill of complaint, the arguments and brief of the respective counsel, on application for a temporary injunction, pendente lite, and the court being now fully advised in the premises, doth find that on the bill and the affidavits submitted, the application for a temporary restraining order herein should be granted.

It is, therefore, ordered and decreed by the court, until the final hearing and decree on the merits, and until further order and decree of the court, that the defendants herein, and each and every one of them, be, and they are hereby enjoined, either as associates in the said Traders' Live Stock Exchange, or otherwise, from combining, by contract, agreement or understanding, expressed or implied, so as by their acts, conduct, or words, to interfere with, hinder, or impede others in shipping, trading or selling live stock, that is, cattle received from the states and territories at

what is known as the Stock Yards at Kansas City, Missouri, and shipped there from other states and territories, for sale there or for further transportation through the states or to foreign markets. And the said defendants and each of them, are enjoined from in any wise interfering with the freedom of access of any and all other traders and purchasers at said Stock Yards, and equal facilities therein and thereto afforded by the Kansas City Stock Yards Exchange or Company, the same as employed by the defendants as members of the said Traders' Live Stock Exchange.

And it is further ordered and decreed, that the said defendants, either collectively as such Trader's Live Stock Exchange, or through its executive committee, or otherwise, and each of them, be and they are hereby enjoined from enforcing or recognizing or acting under the following rules of the said Traders Live Stock Exchange, to-wit: Rule ten (10), eleven (11), twelve (12), and thirteen (13), and any and all amendments thereof, and from imposing or attempting to impose any fines or penalties upon any of the members of such Traders Live Stock Exchange for trading or offering to trade with any person or persons at said stock yards respecting the purchase and sale of any such cattle; or from discriminating in favor of any member of such Traders Live Stock Exchange because of such membership; and especially from, in any manner, discriminating against any person trading at said Stock Yards in such cattle, and from refusing, by united or concerted action, or by word, persuasion, threat, or other means, to deal or trade with persons who are not members of said association, because of such non-membership, or from dealing with any commission firm at said stock yards who may transact or attempt to transact business, in selling or trading in such

cattle thereat, with any person not a member of said Traders Live Stock Exchange; or in any manner from interfering with the right and freedom of any and all persons trading and desiring to trade in such cattle at such yards, the same as if such Traders association did not exist.

It is further ordered that the defendants have leave to make answer to the bill of complaint herein on or before the 20th day of August, next.

JOHN F. PHILIPS,
U. S. District Judge.

The appeal from this decree having been taken to the said circuit court of appeals, that court duly ordered (Rec. p. 58) that certain questions arising upon the record be certified to this court under the provisions of Section 6, of the Act of March 3, 1891; and this court, by its writ duly issued on the petition of appellants, on October 26th, 1897, (Rec. p. 1), required the entire record to be transmitted here for final disposal of the appeal.

The questions which are vital to the validity of the decree of the circuit court and on which appellants ask its reversal, are:

1. Assuming the business engaged in by appellants to be in extent and character as charged in the bill and shown by the record, are they engaged in inter-state commerce?

2. If so, is it any violation of the Act of Congress of July 2nd, 1890, (26 Stat. L., 209) for appellants, as an association of private traders, to agree upon and act under Rule 10, providing that the Exchange will not recognize any yard trader unless he is a member?

3. Is it any violation of said act for appellants to prescribe as a condition of membership in this voluntary association, as provided by Rule 11, that where any member is in partnership with one or more others, all of said partners shall become members?

4. Is it any violation of said act for appellants to agree upon and act under Rule 12, providing that only members should be employed by members as cattle buyers or salesmen?

5. Is it any violation of said act for appellants to agree upon and act under Rule 13, forbidding any member from paying any sum of money to any cattle salesman to induce him to make a sale to such member, or to any order buyer to induce him to make a purchase from such member?

6. Is it any violation of said act for the apellants, in the conduct of their business as private traders, each on his own account, to discriminate in favor of fellow members?

7. Is it any violation of said act for appellants, severally or by concerted action, to refuse to deal with non-members or with commission firms who deal with non-members, so long as such refusal involves simply the peaceable withdrawal from business intercourse, and is unattended by any force, violence or intimidation, or threats of such, and leaves third parties to their free choice of dealing with appellants or with their competitors?

8. Is not said act of July 2nd, 1890, as construed by the circuit court, in violation of the fifth amendment of the constitution of the United States, in that it deprives appellants of liberty or property without due process of law?

SPECIFICATION OF ERRORS.

We assign and specify the following errors:

I.

That the matters charged in the bill of complaint do not constitute any offense against the Statute of the United States of July 2nd, 1890, entitled, "An act to protect trade and commerce against unlawful restraints and monopolies."

II.

That the circuit court erred in granting a decree for a temporary injunction, because the matters charged in the bill of complaint failed to show that appellants were engaged in inter-state commerce and the matters and acts charged, if true, show that appellants are not engaged in inter-state commerce.

III.

That the circuit court erred in granting said decree, for the reason that the act of July 2nd, 1890, as construed by said court, would violate article V of amendments to the constitution of the United States, forbidding that any person should be deprived of liberty or property, without due process of law.

IV.

That the circuit court erred in granting said

decree, for the reason that under the averments of the bill, and the proof of the affidavits filed, the acts of the appellants enjoined, do not constitute any restraint of trade between the states or with foreign nations, within the meaning of said act of July 2nd, 1890.

V.

That the circuit court erred in granting a preliminary decree enjoining appellants "from combining by contract, agreement, or understanding, expressed or implied, so as by their acts, conduct, or words, to interfere with, hinder, or impede others in shipping, trading or selling live stock, that is, cattle received from the states and territories at what is known as the stock yards at Kansas City, Missouri," for the reasons: (a) That no averment of the bill or the affidavits shows or claims any contract, agreement, or understanding between appellants to hinder or impede others in shipping cattle to and from said market; (b) that "trading or selling live stock" on said market is not interstate commerce, and no act of appellants charged in the bill, or shown by the affidavits, constitue any restraint of such commerce within the meaning of the act of July 2nd, 1890; (c) that "the conduct or words" of appellants, as charged in the bill and affidavits, are only such as they might lawfully use in conducting a purely private and local business and do not constitute any infringement of the act of July 2nd, 1890; (d); that the averments of the bill and affidavits fail to show that appellants, or any of them, have anything to do with cattle shipped to the Kansas City market, "for further transportation through the states or to foreign markets."

VI.

That the circuit court erred in enjoining appellants "from in any wise interfering with the freedom of access of any and all other traders and purchasers at said stock yards," for the reasons: (a) That it is not averred in this bill, nor in any affidavit filed, that such freedom of access is interfered with; (b) that the acts of appellants charged to have been committed do not interfere with such freedom of access, but leave parties trading in said market to their free choice of dealing with members of the Exchange, or with non-members; (c) if the exercise of such free choice on the part of the dealers resulted, as charged, in impeding others in their private business of buying and selling on said market, such result would not be a violation of said act of July 2nd, 1890, or in any wise tend to hinder or restrain inter-state commerce within the meaning of said act.

VII.

That the circuit court erred in enjoining appellants, and each of them, "from enforcing, or recognizing, or acting under" rule 10 of said Traders Live Stock Exchange, which is as follows: "This Exchange will not recognize any yard trader unless he is a member of the Traders Live Stock Exchange," for the reasons: (a) That appellants owe no public duty to recognize any yard trader and the Exchange and its members, being an association of private traders, have a right, under the constitution and laws, to recognize whom they please, and may "select their patrons," and may wholly, or partly "cease to do any business, when their choice lies in that direction;" (b) that the "enforcing or recognizing or acting under" said rule

does not constitute any restraint of inter-state commerce within the meaning of said act of July 2nd, 1890.

VIII.

The circuit court erred in enjoining appellants "from enforcing, or recognizing, or acting under" rule 11, which is as follows: "When there are two or more parties trading together, as partners, they shall each and all of them be members of this Exchange," for the reasons: (a), That this voluntary association of private traders have the right to prescribe such conditions of membership as they see fit, and as may be freely acceded to by those joining the organization; (b) neither the bill nor affidavits charge or show any threats of violence or conduct, upon the part of the appellants interfering with or abridging the right of any trader to become a member or not, as his choice may dictate; (c) the "enforcing, or recognizing, or acting under" said rule constitutes no violation of the statute, and does not restrain commerce between the states, or with foreign nations.

IX.

That the circuit court erred in enjoining appellants from enforcing, or recognizing, or acting under rule 12, which is as follows: "No member of this Exchange shall employ any person to buy or sell cattle, unless such person hold a certificate of membership in this Exchange," for the reasons, (a) That appellants, being private traders, each upon his own account, have a right under the constitution and laws of the United States to employ anybody or nobody, for any reason, or no reason, as they may see proper; (b) being voluntarily as-

sociated, the appellants have a right to agree to employ only members, and in so agreeing they do not violate the statute, nor in any wise, restrain inter-state commerce.

X.

The circuit court erred in enjoining appellants from "enforcing, or recognizing, or acting under" rule 13, which is as follows: "No member of this Exchange shall be allowed to pay any order buyer, or salesman, any sum of money as a fee for buying cattle from, or selling cattle to, such party," for the reasons: (a) That appellants have a right to agree voluntarily, that they will not bribe the agent of an owner to make a sale to them, nor bribe the agent of a purchaser to make a purchase from them; (b) that the enforcement of this rule against bribery is lawful, and not in violation of the statute or in restraint of inter-state commerce.

XI.

That the circuit court erred in enjoining appellants from "enforcing, or recognizing, or acting under" said rules, for the reason that said rules are private regulations, voluntarily agreed to, with which the public has no concern, and their enforcement or recognition or action thereunder, by appellants, directly affect appellants only, and do not directly or indirectly restrain inter-state commerce.

XII.

That the circuit court erred in enjoining appellants "from discriminating in favor of any member of such Traders Live Stock Exchange, because of

such membership," for the reasons: (a) That the bill does not charge any such discrimination; (b) if such act of discrimination by a private trader is lawful when done for any reason, it would not be a crime where the act was the same, but the reason was "because of such membership;" (c) appellants have a right, as private traders, to make discriminations in their business, even "unjust discriminations," and can favor one another if they see proper to do so; (d) that such discrimination does not restrain, or tend to restrain, inter-state commerce within the meaning of of the statute.

XIII.

That the circuit court erred in enjoining appellants "especially from in any manner discriminating against any person trading at said stock yards in such cattle, and from refusing, by united or concerted action, or by words, persuasion, threat, or other means, to deal or trade with persons who are not members of said association, because of such non-membership," and from refusing to deal with commission firms who deal with non-members, for the reasons: (a) That "the mere private trader may sell to whom he pleases," "he may select his patrons," and "may make such discrimination in his business as he chooses," and may even "make unjust discrimination;" (b) that no threat is charged in the bill, or shown; (c) that no persuasion or other means are charged in the bill, or shown by the affidavits to have been used, except such as appellants had a perfect right, under the Constitution and laws, to employ; (d) that appellants have a right, under the Constitution and laws, to cease dealing with any person, for any reason satisfactory to appellants; (e) that appellants, as private traders, owe no duty to any

person to deal with such person, and cannot lawfully be compelled to so deal, no matter what their reason for refusing to do so; (f) refusal to deal by a private trader is not a crime, and is not made so, by any particular reason for such action; (g) that the mere "refusing by united or concerted action, or by words, or persuasion, to deal" with any person is not a violation of the act of July 2nd, 1890, does not constitute a restraint of inter-state commerce, and does not interfere with or restrain any commerce; (h) that appellants, severally and together, have the right to cease to do business with any or all of the cattle salesmen, at the stock yards, "when their choice lies in that direction."

XIV.

That the matters charged in the bill of complaint do not constitute any offense at the common law or under any statute of the United States, and the court erred in rendering said decree and in refusing to dismiss the bill.

BRIEF AND ARGUMENT.

Believing that the case is half argued when the propositions involved are fully stated, we have endeavored in the foregoing analysis of the facts to state with clearness and accuracy the questions which arise. Disregarding the subdivisions of the inquiry, the case presents three general points:

First: Whether appellants are engaged in inter-state traffic.

Second: If so, whether by the acts which they are charged to have done and the agreements which by their rules they have entered into, they violate the act of July 2nd, 1890; and,

Third: Whether that act, as construed by the circuit court, is in violation of the fifth amendment to the constitution of the United States, forbidding that any citizen shall be deprived of liberty or property without due process of law.

As to the first proposition it is propounded in that way on the assumption that if the appellants are not engaged in inter-state trade, then *ex necessitate* no combination or agreement among them affecting such trade, even though it were *per se* unlawful, could be in violation of the act of congress. It is assumed in that question that the law is, as unanimously held by this court in *United States vs. E. C. Knight & Co.*, hereafter referred to, that granting inter-state commerce to be restrained for the sake of the argument, yet if the restraint is *indirect* or *incidental*, then "how-

ever inevitable or whatever its extent," it does not constitute an infraction of the federal law. If, therefore, in view of all the averments of the bill and the attitude of appellants with reference to this market, as the same is disclosed by the record, they are not engaged in a trade which it belongs to the federal authority to control and regulate—*i. e.*, inter-state trade—it must follow, regardless of the lawfulness or unlawfulness of their acts and agreements in respect of such trade, that the corrective authority does not reside in congress, and irrespective of the character of their acts and agreements, there would be no violation of the act of July 2nd, 1890.

The argument under the second point, as to the legality of appellant's acts and agreements, though it deals severally with the various acts which they are forbidden to do and with some that they are affirmatively commanded to do, is based throughout on the claim by appellants that they have the right, irrespective of whether their trade is local or inter-state, to do each and all of the things which, by the decree of the circuit court they are forbidden to do, and have an equal right not to do the things which by that decree they are virtually commanded to do.

The third general point in the case involves the serious inquiry (if the act of July 2, 1890, does when construed independently of the constitution, really prohibit the doing of the acts enjoined by the decree appealed from, and compel the doing of the acts commanded by that decree to be done) whether that act itself thus construed is violative of the fifth amendment of the constitution of the United States, providing that no person shall be deprived of liberty or property without due process of law.

The different detailed specifications of error,

the general question of whether the bill states any case under the statute on which it is based, and the minor consideration, on the various phases of the decree, of whether the same should not be wholly or partly reversed, are all covered by a complete view of the matters bearing on the foregoing questions.

We assert the propositions which follow:

I.

Conceding all the facts charged in the bill, even those above noted in which the bill contradicts itself, the appellants are not engaged in, and their organization does not relate to, inter-state commerce.

Bearing in mind that this association of cattle traders is charged under a penal statute of the United States with being a set of banded criminals, with having severally committed acts which will subject them to indictment and heavy punishment; that the circuit court's decree is a finding, preliminarily and on the showing made by the bill and affidavits of guilt on the part of appellants; that although the form of the action brought by the district attorney is in equity, yet the rules to be applied must be the same as if the government had presented the charge by indictment of a grand jury—let us look, first, in this light, at the showing made by the bill and the affidavits filed in support of it, and see whether a preliminary finding that appellants are engaged in inter-state commerce, and therein have violated the Sherman act, can be sustained.

The general allegations of the bill in regard to the nature and diversified character of the Kansas City cattle market, have nothing to do with the point. By the bill itself and the affidavits filed

by the government, as well as by those presented by the appellants, the business in which they are engaged is that of buying and selling on the local market. The showing made as to quarantine cattle, under government inspection, is wholly irrelevant, since appellants have not and are not charged with having anything to do with such cattle, unless and until they pass quarantine and are exhibited for sale on the *local* market, and then appellants in no event appear except as local *buyers*. In point of fact, the undisputed showing is that they have nothing to do with quarantined cattle at all. Likewise the allegations in regard to cattle unloaded at this market for rest and feed, with the privilege of being sold locally or shipped on, as the shipper might elect (constituting about five per cent of the receipts according to the testimony of Greer, for the bill, Rec. p. 15), have nothing to do with the question, since it is not claimed that the trade of appellants touches this class of cattle, except maybe in the event that the local market is made their final destination, and they are therein placed on sale. Now, what was the purpose of these allegations? We assert that they had their birth in the consciousness of the district attorney that he could not invoke the authority of the government unless he could succeed in showing that appellants were engaged in inter-state trade, and that their agreements and acts directly interfered with and restrained such trade. We assert that the counsel for the government, who prepared this bill, conceived and conceded in his own mind that it was necessary to emphasize in the bill the inter-state features of this market, in order, if possible, to show that the appellants were engaged in inter-state commerce, but he did not, at least, so far vary from the undisputed fact as to charge that appellants operated otherwise

than as buyers of cattle offered for sale on the local market and sellers of the cattle so bought on the same market. This position of the appellants, as purely and solely local dealers, we hold to be of essential importance in the correct determination of the soundness of the proposition which heads this paragraph.

This consciousness on the part of the pleader, to which we have referred, is still further (Rec. p. 6½, 7) evidenced by the elaborate effort of the bill to make out that appellants' trade is inter-state by reason of the accidental geographical situation of these yards in two states, and because persons, buyer and seller, standing on the Missouri side of the line, bargain as to cattle then in a pen on the Kansas side, and because cattle bought by some of appellants are often moved afterward from one side of the line to the other. Why was not the additional reason given that the state line runs through pens and alleys and often through the midst of a herd at the time it is being sold, (Embry, Rec. p. 32) so that the herd and even parts of the same animal are in both states at once, and therefore a sale in such case is an inter-state transaction?

Could any contention be more absurd? If a thrifty citizen should acquire real estate and erect a store with the state line dividing it, and there sell merchandise, would he be amenable to the laws of neither state? Could he stand on the Missouri side of his building and sell goods then located on the Kansas side, and reverse the process when selling goods located on the Missouri side, and claim as against state tax laws and all local regulation the protection of the federal government, because that is inter-state commerce? And would his contention be strengthened, if he showed that often, after selling goods located on

the Kansas side, he had them taken for delivery to the exit on the Missouri side of the building, and in doing so they were taken across the state line? Yet this would not be a whit more ridiculous than the grounds on which the government urges in this bill that appellants are engaged in inter-state commerce.

It would seem plain from the authorities, and from reason, that a bargain and sale made in a public market would be regarded as a purely local transaction as to the seller, and certainly so as to the buyer, even when a state line geographically divided the herd of cattle sold; and although a sale might be made in one state and the title and ownership there pass to the buyer, yet the circumstance of the state line being incidentally crossed in moving the cattle from pen to pen, could not be construed so as to render the transaction of buying and selling a matter of inter state commerce. In the case at bar no opinion was delivered by the circuit court, and it would probably not be proper for us to state, *dehors* the record, the orally expressed views of the court on this question. But in the case of *Cotting vs. Kansas City Stock Yards Co.*, 79 Fed., 679, the circuit court for the District of Kansas, speaking of this precise matter, said (p. 682): "In handling the stock, some of it is driven across the state line, and perhaps returned again as it may be most convenient for yarding and feeding or removing from the pens. Can it be because it is located in two states and does business in both, it is answerable to the legislative power of neither state? I think not. It cannot be maintained that its business is inter-state to the exclusion of all state business." The same view was taken by the same court in *United States vs. Hopkins*, now pending here, and in which the traffic of those

engaged in business on the yards was directly involved.

The decisions of the federal courts show clearly what is inter-state commerce, where it begins and where it ends; that national and state jurisdictions do not overlap or interfere; that where one terminates the other attaches; and that the occupation of appellants is purely local.

In *Coe vs. Errol*, 116 U. S., 517 (525), it is said: "There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination. When the products of the farm or of the forest are collected and brought in from the surrounding country to a town or station, serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, *nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state.*"

Kidd vs. Pearson, 128 U. S., 1.

Lehigh Valley R. R. vs. Penn, 145 U. S., 192.

By these and many other authorities which will be cited, as well as by the clear reason which defines the line of demarkation between state and federal authority, it is plain that transportation is an indispensable accompaniment or incident to

inter-state commerce, and such commerce does not *begin* until transportation begins. It is equally clear that it *ends* and local authority re-attaches when the state of destination is reached and the article placed on sale.

Brown vs Houston, 114 U. S., 622.

In *Hynes vs. Briggs*, 41 Fed., 468 (470) the court says: "When goods are sent from one state to another for sale, they become a part of the general property of the state into which they are introduced and amenable to its laws. * * * He (plaintiff) was selling goods then in the state as other local merchants do. He was not engaged in inter-state commerce, and cannot claim immunity from the tax imposed on stove range agents on that ground."

In *United States vs. E. C. Knight Co.*, 60 Fed., 306 (309-10) it is said: "It is the stream of commerce flowing across the states and between them and foreign nations that Congress has authority to regulate. To prevent *direct interference* with or disturbance of this flow alone, was the power granted to the federal government. *Congress has, therefore, no authority over articles of merchandise or their owners, or contracts or combinations respecting them, which have not entered into this stream, or having entered, have passed out.* To extend this authority to business transactions which have no *direct* relation to this commerce, but which *incidentally* affect it, would be unwarranted by the constitutional provision." (S. C., 9 C. C. A.; 156 U. S., 1.)

In the Dueber Watch Co. case, 66 Fed., 642, the Circuit Court of Appeals said: "Whatever differences of opinion there may be as to the mean-

ing of these words when used in the statute, there is and can be no dispute as to one qualification expressed in the act: the trade or commerce restrained or monopolized or attempted to be monopolized, must be inter-state or international. The statute expressly so says, and whatever its phraseology, it must be so construed, if it is to stand, since it is only such trade or commerce that Congress has authority to regulate. * * * The circumstance that after manufactured products are sold within the state, they may be again sold for introduction into another state, and thus become a subject for inter-state commerce, does not change the situation, for it is only when a commodity has begun to move as an article of trade from one state to another that commerce in that commodity between the states has commenced." (per Judge Lacombe).

In the same case, Judge Shipman, concurring, says: "My reason for regarding the complaint as demurrable is the more technical one that the allegations in regard to the acts which the defendants committed, or in regard to the facts which are charged to haue existed, do not show that the defendants restrained any inter-state commerce, or monopolized any part of such trade or commerce."

In charging the grand jury, Judge Grosscup, 62 Fed., 828, said (830): "Any thing which is designed to be transported for commercial purposes from one state to another, *and is actually in transit*, and any passenger who is actually engaged in any such inter-state commercial transaction, and any car or carriage actually transporting or engaged in transporting such passenger or thing, are the agencies and subject matter of inter-state commerce, and any conspiracy in re-

straint of such trade or commerce is an offense against the United States."

In re Greene, 52 Fed., 104, Mr. Justice Jackson says (113): "Commerce among the states, within the exclusive regulating power of congress, consists of intercourse and traffic between their citizens and includes the transportation of persons and property as well as the purchase, sale and exchange of commodities. *County of Mobile vs. Kimball*, 102 U. S. 691–702; *Gloucester Ferry Co. vs. Pennsylvania*, 114 U. S., 203.

"In the application of this comprehensive definition, it is settled by the decisions of the Supreme Court that such commerce includes not only the actual transportation of persons and commodities between the states, but also the instrumentalities and processes of such transportation. * * * When the commerce begins, is determined not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carriage for transportation, or the actual commencement of its transfer to another state; * * * and further, that after the termination of the transportation of commodities or articles of traffic from one state to another, and the mingling or merging thereof in the general mass of property in the state of destination, *the sale, distribution and consumption thereof in the latter state forms no part of inter-state commerce. Pensacola Tel. Co. vs. Western Union Tel. Co.*, 96 U. S., 1; *Brown vs. Houston*, 114 U. S., 622; *Coe vs. Errol*, 116 U. S.. 517–520; *Robbins vs. Taxing Dist.*, 120 U. S., 497; and *Kidd vs. Pearson*, 128 U. S., 1."

The important point in correctly determining the proposition now under consideration is, when does the aegis of federal authority cease to protect the imported article? When does its disposition and movement cease to be inter-state commerce? It was claimed in the circuit court, that property shipped from a foreign state to a local market and exhibited for sale remains inter-state commerce, exempt from all but federal control, until a sale is actually made. It will be borne in mind that appellants are *buyers* on a local market of cattle there placed on sale by their owners, and *sellers* of the cattle thus bought on the same market. We deny that such transactions are inter-state commerce. We deny that the disposition of imported cattle so placed on sale is any part of such commerce. If it were so, then every owner who exhibits goods for sale, which he has imported from another state or country, would be exempt from all local merchandise tax. Imported machines, imported dry goods, imported clothing, imported groceries, imported articles of any kind, placed on sale on a local market could not occupy in the eye of the law any different position, in respect of their sale, or the disposal of them be any less inter-state commerce, than that of imported cattle so placed on sale. The unqualified proposition that an imported commodity remains under federal control until a sale is actually made, would necessarily apply to all articles, and the absurd conclusion would follow that possibly ninety-nine per cent of the tax on merchants, state and municipal, is unconstitutional as an attempted regulation of inter-state commerce. The "original package" cases have no bearing on the question. Is a live animal, a commodity of the farm, any more an original package than a sewing machine, or a bolt of dry goods, or a piece of jewelry? It is

an article of commerce, and not less so because from its nature it must be exhibited for sale in a pen, instead of on a shelf or in a show case.

But it was admitted by the counsel for the government in the circuit court, and doubtless will be so admitted here, that an imported article is loosened and freed from the control of the federal government, whenever it has "passed into and become commingled with the mass of the property of the state." This language is frequently found in the decisions, and just when this "passing into and becoming commingled" occurs is important.

On the one hand it is clear that it will not do to say that the authority and protection of the government is relinquished as soon as the article which is the subject of inter-state commerce passes the boundary line and enters the state of its destination. It certainly does not, by virtue of this fact alone, "pass into and become commingled with the general mass of property in the state." On the other hand the theory of the bill in this case is false in that it assumes that the traffic remains and continues inter-state until a sale of the imported article is made, and that such article does not become "commingled" and subject to local jurisdiction until thus sold. The bill, as heretofore stated, exhibits a strained attempt to establish that the *sales* of imported articles are a part of inter-state commerce, and that not only those who *sell* but those who *buy* such articles on a local market are engaged in inter-state commerce and their conduct therein is subject to the control and legislation of the federal government. This we deny. If these appellants, who buy imported cattle placed on sale by their owners in the pens of the Kansas City stock yards, are when doing so, engaged in inter-state commerce, then it must follow that every purchaser of almost every article sold in the various emporiums

of trade in a non-manufacturing state like Missouri, are engaged in inter-state commerce, the buyer of a paper of pins not less so than the purchaser of a steer. It must further follow that in respect of all such traffic in imported articles, no local authority to tax or regulate exists. We deny this, and assert that where the importer or his agent places on sale in any local market an imported article, *he by that act* mingles such article in the mass of local property so as to deprive the transaction of its sale of the character of inter-state commerce.

In *Brown vs Maryland*, 12 Wheat: 419, the case on which all the original package decisions were founded, and the case on authority of which it was afterward sought to establish the doctrine that in *every* instance *a sale* was necessary by the importer before the imported article could be "commingled in the general mass" of local property—in that very case such doctrine is rejected by Chief Justice Marshall, (p. 443) when he says: "This state of things is changed if he sells them, *or otherwise mixes them with the general property of the state*, by breaking up the packages and traveling with them as an itinerant peddler * * * In the last case, the tax finds the article already incorporated with the mass of property by the act of the incorporator." So, by this decision, the importer *may* mingle the article with the mass of local property otherwise than by sale, and may do so by placing them on sale, by himself or through an agent.

In another unanimous decision of this court, the effect of the decision in *Brown vs. Houston*, *supra*, is thus declared: (*Emert vs. Missouri*, 156 U. S., 296, 317): "In *Brown vs. Houston*, (1885)

114 U. S., 622, coal brought in flat boats from Pittsburg to New Orleans, *was still afloat in the Mississippi river after its arrival, in the same boats and in the same condition in which it had been brought, and was held in order to be sold on account of the original owners by the boat load.* Yet this court unanimously decided that a tax imposed by general statutes of the State of Louisiana upon this coal was valid, and speaking by Mr. Justice Bradley, said: * * * '*It was imposed after the coal had arrived at its destination, and was put up for sale.* The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans.'"

This court, by the same eminent justice who delivered its opinion in *Coe vs. Erroll* and *Brown vs. Houston*, made the distinction for which we contend, in *Robbins vs. Shelby Taxing District*, (1887), 120 U. S., 489, where it said (p. 497): "As soon as the goods are in the state and become part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held by this court, in the case of *Brown vs. Houston. When goods are sent from one state to another for sale, or in consequence of sale, they become part of its general property and amenable to its laws.* * * * *But to tax the sale of such goods, or the offer to sell them, before they are brought into the state, is a very different thing*, and seems to us clearly a tax on inter-state commerce itself." The same distinction is unanimously recognized by this court in the case of *Emert vs. Missouri*, (1895), 156 U. S., 296, where counsel for plaintiff in error strenuously argued, as appears from their brief, that the amalgamation of imported articles with the mass of local property could only be effected by *sale* of

such articles. But the court, speaking by Mr. Justice Gray, after an exhaustive and thorough review of all the cases, theretofore decided, bearing on the question from *Brown vs. Maryland* down to the date of the opinion, said (311): "There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one state to another, *and were neither inter-state commerce in themselves nor were they in any way directly connected with such commerce.* * * * Both the occupation and the goods, therefore, were subject to the taxing power and to the police power of the state."

Again, in *Pittsburg, etc., Coal Co. vs. Bates*, 156 U. S., 577, where coal, still in the original barges by which it was imported, was moored in the Mississippi river, off Baton Rouge, to be sold there or further transported, as the importer might choose, a tax was levied thereon by the parish of East Baton Rouge. The importer sought to enjoin the collection of the tax on the ground that the property had not become "commingled with the general mass of property" of the parish, and in the brief in that case strong effort was made to induce the court to modify or overrule *Brown vs. Houston*. But the court, speaking by Mr. Justice Field, again unanimously sustained the doctrine of that case, and said (589): "The property in this case, as in that, still belongs to the original owners in Pennsylvania, but is brought on the navigable waters of the United States in boats and barges to Louisiana for purposes of sale, and is subject to taxation and sale as any other property of the citizens of the United States is subject when it becomes incorporated into the bulk of the property of the country."

These propositions are established:

1. The location of the Kansas City stock yards in two states, and the facts alleged and shown in relation thereto does not render the business of buying cattle on this market and reselling on the same market inter-state commerce.

2. When the importer places an article of commerce on sale in a local market, *he by that act* incorporates it into the mass of local property in the state where it is offered for sale, and the purchaser of such article is not engaged in inter-state commerce.

3. Combinations and agreements respecting a purely local trade are not subject to the control of the government of the United States, and cannot come under the condemnation of its penal laws.

4. Contracts, combinations or conspiracies among those engaged in domestic commerce "might unquestionably tend to restrain *external* as well as *domestic* trade, but the restraint would be an *indirect* result, *however inevitable and whatever its extent*," and even in such case there would be no violation of the act of July 2nd, 1890. (*E. C. Knight Case*, 156 U. S., 1–16).

From the foregoing considerations and the authorities in their support, it must follow that appellants are not engaged in inter-state commerce, and their organization in respect to such trade as they do engage in could not be in violation of the act of of congress in question.

II.

No act or agreement of appellants, charged in the bill, and no act or agreement not so charged, but from the doing or enforcing which they are enjoined, constitutes any violation of the Act of Congress, or is otherwise unlawful. This is true, waiving for the sake of the point, the character of the trade engaged in by appellants, whether inter-state or local.

Since many of the detailed specifications of error are in our view to be determined on the same reasoning and authorities, the general proposition above stated is laid down for convenience of presentation and to avoid unnecesary prolixity and repetition. In the review of the various points of the decree, the general question raised will be followed by a statement of the particular grounds on which it is contended that the decree is erroneous in each several feature of its terms. The initial paragraph of the injunction (Rec. p. 44) whereby appellants are restrained "from combining by contract, agreement or understanding, expressed or implied, so as by their acts, conduct or words, to interfere with, hinder or impede others in shipping, trading or selling live stock" on this market (Specification V); and "from in any wise interfering with the freedom of access of any and all other traders and purchasers at said yards" (Specification VI) first invites attention. The generality of this language, if it stood alone, might be such as to puzzle a citizen honestly disposed to obey the laws of his country; and his uncertainty would naturally arise from his ignorance of *what acts* of his, in the meaning of the law, would constitute "impeding" or "interference."

If two rival tradesmen, according to the most legitimate methods conceivable, seek the custom of the same party, the successful one, in a substan-

tial sense, "impedes," "hinders" and "interferes with" the operations of the other. There is nowhere in this record, in the bill or out of it, any claim that appellants hindered, impeded or interfered with their rivals or prevented their free access to the market, by any process of physical compulsion, force, violence or intimidation, or threats of such. We feel justified in assuming, therefore, that in the estimation of the government's counsel and of the court granting the injunction, the particular acts and agreements afterward specified and prohibited in the decree were the unlawful means whereby the hindrance, impeding, interference and prevention of access were accomplished. So that the matter involved in the two points of error mentioned is merged in the important inquiry on this branch of the case of whether, by the particular acts and agreements enjoined, the appellants violate the act of July 2nd, 1890.

Having in mind that the bill is replete with epithets and averments of mere conclusions of law we think it proper to quote here from the great decision of Mr. Justice Jackson In *re*, *Greene*, 52 Fed. 104, (111): "If the particular acts or facts charged do not, as a matter of law, constitute contracts, combinations and conspiracies in restraint of trade and commerce among the several states, or a monopoly, or attempt to monopolize any part of such trade or commerce, no amount of averments or allegations that the accused engaged in a combination, or made contracts in restraint of such trade or commerce, or monopolized or attempted to monopolize the same, will avail to sustain the indictment. *Whether the accused is charged with an offense is to be determined by the particular acts or facts set forth, and not by the conclusions of the pleader.*"

1. Looking at the acts or facts uncovered from the mass of argumentative pleading in which they are imbedded, it is apparent that the fundamental matter of complaint, as alleged, is that appellants "refuse to purchase cattle, or in any manner negotiate or deal with or buy from any commission merchant" who sells to or buys from any speculator not a member of the exchange (Rec. p. 8); and the central point of the decree (Rec. p. 44) is that appellants, and each of them, should be restrained "from discriminating in favor of any member, *because of such membership*, and especially from, *in any manner*, discriminating against" or refusing to deal or trade with non-members (or those who deal with them) "*because of such non-membership.*" So that the chief misdemeanor of which appellants were esteemed guilty consisted in favoring each other, *because of membership*, and in refusing to deal or trade with certain others *because of non-membership*. These acts, *if done for these reasons*, are, according to the decree, in actual restraint of inter-state commerce and a consequent violation of the act of congress; but it is fair interpretation to say that *if the same acts* were done *for any other reason* (as, for example, if discrimination in favor of a member was because he was a particular friend, or especially honorable and upright in his dealings, and discrimination against a non-member was because he was disreputable in his methods and a scoundrel in character, or because he countenanced and supported such people), then such acts of discrimination, though, in fact, identical with those which restrained inter-state commerce, would nevertheless not in fact operate to restrain such commerce, *and this by virtue of the reasons which prompted them.*

In relation to this point of the decree, *i. e.*,

discrimination for, by reason of membership, and against, by reason of non-membership, several propositions seem evident.

(*a*) *The effect of any given act or agreement on trade, that is, whether it does in fact restrain, check, hinder or impede trade, cannot be determined by the motive which animated the perpetrator.*

No act or agreement could violate the statute under consideration unless in effect and fact it restrained inter-state trade. If it did so, it would constitute a violation of the law, regardless of the motive or reason of the doer or contractor. If a given act or agreement of discrimination in trade actually produced a restraint of trade, its effect would not be different, because in one case and another, a different reason caused it. It would not be a crime in one case where the reason was "because of such membership or non-membership," and be a lawful or laudable act or agreement in another case, where the reason was something else. This court, in the Trans-Missouri Freight case, 166 U. S., 290, under the supposed compulsion of which the decree appealed from was rendered, but which we rely on here and hereafter, said (p. 341): "In the view we have taken of the question, the *intent* alleged by the government is not necessary to be proven. The question *is one of law* in regard to the meaning and effect of the agreement itself—namely: *Does* the agreement restrain trade or commerce in any way so as to be a violation of the act?" So that we insist on this proposition that the question is: Whether acts or agreements of discrimination by private traders on a local market in the conduct of their private business, for or against those similarly engaged, do in fact and effect restrain inter-state commerce; and we insist

that the burden, which the defense of this decree imposes on the counsel for the government, requires counsel to hold that such acts and agreements are restraints and offenses against the statute, regardless of the reasons for them. This the defender of the decree cannot logically shrink from.

(*b*) *Restraint of the trader* (*competitor*) *is not a restraint of trade.*

The simplest, msot legitimate process of rivalry for the same custom must result in "restraining," "hindering," "impeding" the unsuccessful rival. If two sellers of cattle solicit the same purchaser, by as much as one succeeds the other fails, and the restraint of the trader has followed but no "restraint of trade." The uncontradicted proof in this case shows (Rec. p. 39) that in December preceding the filing of this bill there were 259 traders, employers and employees, engaged in business on these yards, of whom about 150 had joined this association. Those who had not seen proper to join, who did not care to have their methods revised and scrutinized by any organization of their fellows, and who preferred the free and unrestricted license of operating as they pleased, honorably or otherwise, thought that they could fare better in their competition with their organized rivals by each pursuing his own undisciplined way, as he had the unquestionable right to do. They chose, as better for the individual interest of each, the unbridled course of independent dealers, as they had a right to do. If they "boycotted" the organization or those who dealt with them, and succeeded in routing their antagonists in the field of free competition, no complaint of it has been filed by the district attorney, and they have not as

yet been charged with operating in restraint of inter-state commerce. Whether in case this one-third of the traders on this market had succeeded in making their trade sufficiently attractive to demoralize and defeat their organized comepetitors, they would have been arraigned as having operated in restraint of inter-state commerce, is matter of prophecy in which we cannot deal. But since the fact is that the commission merchants who are sought as the customers and patrons of the two sets of competitors, the organized and unorganized, happen, in the strife of commerce, to prefer recognizing and dealing with those who deal from a standpoint of regularity and responsibility; since the further fact is (Rec. p. 25) that by the practically unanimous testimony of the cattle salesmen on this market the appellant association has resulted in greatly improving the market, which is perfectly shown by the statistics of business (Rec. p. 42); it is plain that the complaint here is not that *the trade* has been restrained, but that certain disgruntled and discomfitted *traders* have been. We say that this is the complaint. No allegation of the deteriorated condition of the market, brought about by this association, is made, and it would be completely refuted by the record if it had been. No such issue is tendered.

But the showing is, by the bill and affidavits in its support, that appellants, by inducing certain commission merchants to patronize them exclusively, *as a result*, injured their rivals. A fatal mistake of the theory of the bill and of the decree, is that "hindering," "impeding" and even driving out competitors by ordinary and, as will be shown, legitimate methods, is a violation of the statute, though the trade, the market, be not injured, but improved. As is stated in one case, "the effort of all competition is to drive out competitors." Here

two rival sets of traders engage in a struggle for supremacy; one is worsted, and invokes the strong hand of the government to crush its antagonist. There is no offense but success, no crime but getting the better of your competitor, is the theory of the bill and the decree; and this, though the *market* is benefitted rather than injured, though *the trade* is phenomenally developed rather than restrained.

(*c*) *Appellants cannot be compelled to deal with others.*

An injunction restraining one from refusing to do a thing makes it mandatory upon him to do that thing. The injunction is against "refusing to deal because of such non-membership," but, as has already been pointed out, if a refusal, prompted by that reason, would in effect and fact restrain inter-state commerce, it would demonstrably have the same effect if based on a different reason; and, if such refusal did not have the effect to restrain trade, within the meaning of the statute, the reason for it could not give it that effect. A command to deal and trade, then, becomes an absurdity, since it could only be obeyed by the individual enjoined acceding to such terms as might be imposed by the other party.

(*d*) *These appellants as private traders, each on his own account, owe no duty, public or other, to deal or trade with anyone and their refusal to do so, with or without reason, is not a violation of the statute.*

The assumption of the existence of such a duty on their part is a conspicuous fallacy in the

theory of the bill and of the decree. They "unlawfully and oppressively refuse to purchase or deal," says the bill. They must not discriminate in favor of a fellow member, nor refuse to deal with or "*in any manner*" discriminate against any outsider, but in all their business dealings on these yards they must act towards others engaged in business "the same as if such Traders' Association did not exist," enjoins the decree. This deprivation of the freedom to act and to contract in reference to purely private business cannot, it is believed, be matched in any adjudication that preceded the one under review.

The acts of the appellants, which we have been considering, were the means employed to benefit their private business, and no prevention or hindrance to others except what resulted from these acts is charged. The term "boycott," as applied to the alleged acts, is plainly misused. That word had its birth in violence and intimidation, and this element of its meaning must remain inseparable from its correct and proper employment.

Peaceably abstaining from business intercourse with certain persons, is the head and front of appellants offending as charged. This they had a right to do, and in doing so they did not interfere with or restrain inter-state commerce, and did not "boycott" anybody. They each and all, as private traders, had and have the right, separately or together, to cease doing business with any or all other persons on this market, and can so cease without offense to any of the laws of the United States, and without violating any of the rights of others.

No man, prior to this, was ever held entitled as a matter of law to the private custom of a number of his fellows.

Turning now to the authorities bearing on the various propositions above stated, we find them sustained with unanimity.

In *Prescott, etc., R. R. vs. Atchison, etc., R. R.* 73 Fed., 438, Judge Lacombe said: "All legislation interfering with the right of the individual, whether he be a natural person or a corporation to enter into contracts or exercise his preferences as to the persons with whom he shall do business, should be cautiously construed. It is legislation of a novel character, and should not be extended beyond the plain import of the language of the law makers."

The debatable point as to what means may be employed, and what may not, in the battle of free competition, is well stated by Judge Oliver Wendell Holmes in *Vegelahn vs. Gunter*, 167 Mass., 92 (106–107): "We all agree that it cannot be done by force or threats of force. We all agree, I presume, that it may be done by persuasion to leave a rival's shop and come to the defendant's. It may be done by the refusal or withdrawal of various pecuniary advantages, which, apart from this consequence, are within the defendant's lawful control. It may be done by the withdrawal, or threat to withdraw, such advantages from third persons who have a right to deal or not to deal with plaintiff, as a means of inducing them not to deal with him either as customers or servants."

Perhaps as fine an analysis and definition of the right of traders to deal or refuse to deal and to make exclusive conditions in the free struggle for commercial supremacy, will be found in the decisions of the *Mogul Steamship Co. vs. McGregor*, 23 Q. B. D., 544, s. c.: 23 L. B. D., 598, s. c.; App.

Cas., 1892, p. 25, referred to with marked approval by Mr. Justice Jackson *In re Greene*.

In that case plaintiff and defendants were owners of various steamers engaged in trade between England and the ports of Shanghai and Hankow, in China. The defendants, desiring to secure all of that trade, entered into an agreement or "conference" designed to drive the plaintiff's ships out of the trade so as to appropriate the whole of it to the conference steamers. First, it was stipulated that if outsiders should start for Hankow they were to be met by conference steamers and encountered with "effective opposition." Secondly, it was stipulated that the agents of the conference ships should be "prohibited from being interested, directly or indirectly, in outsiders;" *i. e.*, they were to be removed from the agency of defendants' ships if they took any part in the business of non-conference steamers. Thirdly, the agreement provided for a rebate of 5 per cent being made to firms which shipped exclusively by conference ships, a benefit which was to be denied if a single shipment were made by an outsider, except where there was no conference ships in port or named for dispatch within a week with available cargo space.

In the trade war which ensued, the conference won. The action was for an injunction and for damages.

Lord Coleridge, chief justice, on the trial said (21 Q. B. D., 552): "The defendants are traders with enormous sums of money embarked in their adventures, and naturally and allowably desirous to reap a profit from their trade. They have a right to push their lawful trade by all lawful means. They have a right to endeavor by lawful means to keep their trade in their own hands and by the same means to exclude others from its ben-

efits, if they can. Amongst lawful means is certainly included the inducing, by profitable offers, customers to deal with them rather than with their rivals. It follows that they may, if they think fit, endeavor to induce customers to deal with them exclusively by giving notice that only to exclusive customers will they give the advantage of their profitable offers." On appeal from a judgment for defendants, Bowen, L. J. (23 Q. B. D., 614), said: "There was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiff's share. I can find no authority for the doctrine that such a commercial motive deprives of 'just cause or excuse,' acts done in the course of trade which would, but for such a motive, be justifiable. So to hold would be to convert into an illegal motive the instinct of self advancement and self protection, which is the very incentive to all trade. To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection."

Fry, L. J. (p. 626) said: "Competition exists where two or more persons seek to possess or enjoy the same thing; it follows that the success of one must be the failure of another, and no principle of law enables us to interfere with or to moderate that success or that failure so long as it is due to mere competition. * * * * No case has been or, I believe, can be cited where the only means used by the defendant to injure the plaintiff has been competition pure and simple. I think that if we were now to hold interference by mere com-

petition unlawful, we should be laying down law both novel and at variance with that which modern legislation has shown to be the present policy of the state."

The appeal was dismissed, Lord Esher, Master of the Rolls, dissenting.

On appeal to the House of Lords, Lord Chancellor Halsbury said (App. Cas., 1892, p. 38): "What is the wrong done? What legal right has been interfered with? What coercion of the mind, or will, or of the person is effected? All are free to trade upon what terms they will and nothing has been done except in rival trading which can be supposed to interfere with appellant's interest. * * * * (p. 40) I am of opinion, therefore, that the whole matter comes round to the original proposition, whether a combinatin to trade and to offer, in respect of prices, discounts and other trade facilities, such terms as will win so large an amount of custom as to render it unprofitable for rival customers to pursue the same trade, is unlawful and I am clearly of the opinion that it is not."

Lord Bramwell (p. 47) said: "Suppose the case put in argument: In a small town there are two shops, sufficient for the wants of the neighborhood, making only a reasonable profit. They are threatened with a third. The two shopkeepers agree to warn the intending shopkeeper that if he comes they will lower the prices, and can afford it longer than he. Have they committed an indictable offense? Remember the conspiracy is the offense, and they have conspired. If he, being warned, does not set up his shop, has he a cause of action? He might prove damages. He might show by his skill he could have beaten one or both of the others. Would a ship owner who intended to send his ship to Shanghai, but desisted owing to the

defendant's agreement, and on being told by them they would deal with him as they had with plaintiff, be entitled to maintain action against the defendants? Why not? If yes, why not every shipowner who could say he had a ship fit for the trade, but was deterred from using it?"

Lord Morris said (p. 49): "The object was a lawful one. It is not illegal for a trader to aim at driving a competitor out of trade, provided the motive be his own gain, by appropriation of the trade, and the means he uses be lawful weapons. Of the first four, of the means used by the defendants, the rebates to the customers and the lowering of the freights are the same in principle, being a bonus by the defendants to customers to come and deal with them exclusively. The sending of ships to compete and the indemnifying other ships was the competition entered on by the defendants with the plaintiffs. The fifth means used, viz: the dismissal of agents, might be questionable according to the circumstances: but in the present case the agents filled an irreconcilable position in being agents for the two rivals, the plaintiffs and defendants. Dismissal under such circumstances became, perhaps, a necessary incident of the warfare in trade.

"*All the acts done, and the means used by the defendants, were acts of competition for the trade. There was nothing in the defendant's acts to disturb any existing contract of the plaintiffs, or to induce any one to break such.* Their action was aimed at making it unlikely that any one would enter into contracts with the plaintiffs, the defendants offering such competitive inducements as would probably prevent them."

All the Lords concurred in dismissing the appeal.

Toledo, etc., R. R. vs. Penn Co. et al., 54 Fed. R., 730 (738), it is said: "Ordinarily when such a combination of persons does not use violence, actual or threatened, to accomplish their purpose, it is difficult to point out with clearness the illegal means or end which makes the combination an unlawful conspiracy; for it is generally lawful for the combiners to withdraw their intercourse and its benefits from any person, and to announce their intention of doing so, and it is equally lawful for the others of their own motion to do that which the combination seek to compel them to do."

In *Manufacturer's Outlet Co. vs. Longley*, 37 A. Rep., 535, Sup. Ct. R. I., (June 23rd, 1897), it is held: "No cause of action for an injunction is stated by a bill alleging that defendants combined to induce certain publishers to refuse to publish complainant's advertisements, and to that end threatened to withdraw their advertisements if complainants were accepted."

In *American Live Stock Com. Co. vs. Chicago Live Stock Exchange*, 143 Ill., 210, it is said: "Admitting the right of complainant to embark in and prosecute the business for which it was organized freely and without improper obstruction, *it does not follow that it has the right to deal with parties who are unwilling to so deal, or to compel those who do not choose to do so, to purchase its property. Absolute freedom of commercial intercourse, to which a party may be entitled, is not interfered with by the refusal of another to deal with such party on any terms. The refusal of any or all of the members of the Exchange to purchase live stock of the complainant is merely an exercise of their clear and legal prerogative.*"

And again, "These rules, having been adopted, presumably with the approval of the members of the Exchange, there is no reason to suppose that they will not be voluntarily obeyed, *and such voluntary obedience is a matter which the courts have no power to restrain.*"

And again, "It (the Stock Yards Co.) would doubtless be held bound to keep its market open alike to all who might desire to do business therein, and perhaps to make no discrimination between individuals. But it does not follow, that dealers resorting to said market for purposes of trade, would be subjected to similar rules of public policy. They would deal with each other merely upon the footing of private parties, owing each other no duties except those which the rules of honesty and fair dealing impose. *Each would be at liberty to deal or decline to deal with others, precisely as he saw fit.*

Nor can it be seen how combinations between merchants doing business in such public market, either with a view of increasing or diminishing competition, or of enhancing or diminishing prices, would be subjected to any rules different from those which apply to such combinations wherever made. As individual merchants, they would be subjected in their dealings with each other to no peculiar rules of public policy growing out of the fact that such dealings were in a public market, *and an agreement between any number of them not to deal with any particular person, or class of persons, would not, of itself, subject them to such rules.*"

In *Macauly vs. Tierney*, 33 Atl. Rep., 1-4, it is said: "It was perfectly competent for the members of the association, in the legitimate exercise of their own business, to bestow their patronage on whomsoever they chose, and to annex any condi-

tion which they saw fit. The wholesale dealers were free to comply with the condition or not, as they saw fit. If they valued the patronage of the members more than that of the non-members, they would doubtless comply; otherwise, not."

In *Dueber Watch Co. vs. Howard Watch Co.*, 14 C. C. A., 14 (S. C., 66 Fed., 637) it is said (p. 23): "It is difficult to see wherein the agreement complained of is injurious to the public. Certainly it is not one in general restraint of trade. It seems to be a reasonable business device to increase the trade of one set of competitors at the expense, no doubt, of their business rivals, who are equally free to avail themselves of similar devices to secure their own trade. As such, it is not obnoxious to the statute. The agreements or contracts complained of, being not unlawful, the giving notice to the world of their existence is no offence."

Hunt vs. Simonds, 19 Mo., 583.

In *U. S. vs. Addyston Pipe Co.*, 78 Fed., 712, it is said (p. 722): "Federal authority exists only when a monopoly or a contract in restraint of trade assumes such form or has such effect as to go beyond any common law conception of these terms, and interferes directly and substantially with inter-state commerce, or commerce with foreign nations; and this it must do directly and not incidentally; nor does the mode in which the association conducts its business have any direct relation to inter-state commerce."

In re Hachler, 149 N. Y., 414.
Board of Trade vs. Nelson, 162 Ill., 431.
People vs. N. Y. Commercial Assn., 18 Abb. Pr., 271.

Dickinson vs. Chamber of Commerce, 29 Wis., 45.
Jackson vs. Live Stock Exchange, 68 N. W., 1051.
Thomas vs. Musical Union, 121 N. Y., 45.
Arthur vs. Oakes, 63 Fed., 310.
U. S. vs. Cassidy, 67 Fed., 698.
Cole vs. Murphy, 158 Pa. St., 420 (431).

In the case of *Bohn Mnfg. Co. vs. Hollis*, 54 Minn., 223, where the exact matters here considered are ably and comprehensively discussed, the court, speaking by Judge Mitchell, said (p. 231): "This is the age of associations and unions, in all departments of labor and business, for purposes of mutual benefit and protection. Confined to proper limits, both as to ends and means, they are not only lawful but laudable. Carried beyond those limits, they are liable to be dangerous agencies for wrong and oppression. Beyond what limits these associations and combinations cannot go, without interfering with the legal rights of others, is the problem which, in various phases, the courts will doubtless be frequently called to pass upon. There is perhaps danger that, influenced by such terms of elusive meaning as 'monopolies,' 'trusts,' 'boycotts,' 'strikes,' and the like, they may be led to transcend the limits of their jurisdiction, and, like the court of King's Bench, in *Boggs' Case*, 11 Coke, 93*a*, assume that, on general principles, they have authority to correct or reform everything which they may deem wrong, or, as Lord Ellsmere puts it, 'to manage the state.'" (p. 233) "By the provisions of the by-laws, if they (defendants) traded with the plaintiff, they were liable to be expelled; but this simply meant to

cease to be members. It was wholly a matter of their own free choice which they preferred—to trade with plaintiff or continue members of the association."

(Id.) "If an act be lawful—one that the party has a legal right to do—the fact that he may be actuated by an improper motive does not render it unlawful. As said in one case, 'the exercise by one man of a legal right cannot be legal wrong to another;' or, as expressed in another case, 'malicious motives may make a bad case worse, but they cannot make that wrong which, in its own essence, is lawful."

(Page 234, par. 5) "It is properly lawful for any man (*unless under contract obligation, or unless his employment charges him with a public duty*) to refuse to work for or deal with any man or class of men, as he sees fit. This doctrine is founded on the fundamental right of every man to conduct his own business in his own way, subject only to the condition that he does not interfere with the legal rights of others. * * * This has been repeatedly held in regard to associations or unions of workmen, and associations of men in other occupations must be governed by the same principles."

In *Deuber Watch Case Mfg. Co. vs E. Howard Watch Co.*, 55 Fed., 851, District Judge Coxe sustaining a demurrer, said (853): "Is it an illegal act, within the provisions of the law in question for two or more traders to agree among themselves that they will not deal with those who prefer to purchase the goods of another designated trader in the same business? Many perfectly legitimate reasons might be suggested for such an agreement. * * * The plaintiff was perfectly free to engage in every branch of the watch mak-

ing business. So were all others. The plaintiff's customers were free to purchase of the plaintiff, of the defendants, or of any other manufacturer. * * * The construction contended for by the plaintiff would render each of the defendants liable to indictment not only, but would make unlawful almost every combination by which trade and commerce seek to extend their influence and enlarge their profits. It would extend to every agreement where A and B agree that they will not sell goods to those who buy of C. It would strike at all agreements by which honest enterprise attempts to protect itself against ruinous and dishonest competition."

On this question, affirming the judgment below (S. C., 66 Fed., 637) the Court of Appeals, by Judge Lacombe said (645): "An individual manufacturer or trader may surely buy from and sell to whom he pleases and may equally refuse to buy from or sell to anyone with whom he thinks it will promote his business interests to refuse to trade. That is entirely a matter of his private concern, with which governmental paternalism has not as yet sought to interfere, except when the property he owns is devoted to a use in which the public has an interest. * * * Certainly there is nothing unlawful or unfair in the statement to the trade by the maker of any kind of merchandise: 'My goods are for sale only to those who buy of me exclusively, not to others.' * * * Nor can it be claimed that such an agreement between sellers who represent but a part of the trade is injurious to the public, which has all of the rest of the trade to deal with."

In *Hopkins vs. Oxley Stave Co.*, (U. S. C. C. A., eighth circuit, not reported) the court said:

"The courts have invariably upheld the right of individuals to form labor organizations for the protection of the interest of the laboring classes, and have denied the power to enjoin members of such associations from withdrawing peaceably from any service, either singly or in a body, even when such withdrawal involves a breach of contract. (*Arthur vs. Oakes*, 63 Fed. Rep., 310)." The above was not reported at the time of preparing this brief. The court there divided, not on the law, but on the fact of whether intimidation had been resorted to.

Judge Caldwell, dissenting, in an able and learned opinion, among other things said:

"In the Mogul Steamship case Lord Coleridge said it was the resolute purpose of the defendants 'to exclude the plaintiffs if they could, and to do so without any consideration of the results to the plaintiffs if they were successfully excluded. This, I think, is made out, and I think no more is made out than this. Is this enough? It must be remembered that all trade is in a sense selfish; trade not being infinite; nay, the trade of a particular place or district being possibly very limited—what one man gains another loses. In the hand-to-hand war of commerce * * * men fight on without much thought of others, except a desire to excel or defeat them;' and the learned judge held that plaintiff could have no redress from their losses—they were losses incident to competition in business."

The facts in the last cited case were entirely dissimilar to those in this. Jurisdiction of the Federal courts existed on the same general ground that gives them cognizance of ordinary civil controversies between citizens of different states; no question of inter-state commerce or of the application of federal law arose; but in so far as concerns

the general and inherent right of men engaged in trade to do the acts here prohibited, the law as held by all the judges is declared as we here contend for it.

It will be borne in mind that no attempt to control either supply or prices is charged; and the comparatively small percentage of the cattle which appellants and their competitors aspire to handle, as shown by both parties, as well as the terms of the decree, prove that the injunction did not proceed upon the idea that appellants were attempting to absorb the traffic. Indeed, the bill is grounded upon the first section of the Act of July 2nd, 1890, (Rec. p. 9), and no issue of monopoly or attempt to monopolize, as defined in the second section, is tendered.

"*A contract does not restrict the sale of a commodity, which does not look toward withholding the supply from the market, nor to enhancing the price.*"

Central Shade Roller Co. vs. Cushman, 143 Mass., 353 (363).

(c). "*The same test cannot be applied to the acts, contracts and combinations of private traders, as should be to public corporations, such as railroads.*

We have already pointed out that the assumption of the bill and decree, which, in our view, aside from the character of the trade, constitutes the fundamental error of both, is that appellants owed the duty to the rival body of traders to deal with them and their patrons, and not to discriminate. Speaking to this precise point, this court by Mr. Justice Peckham, in the *Trans-Missouri Freight Case*, 166 U. S., 290, pointed out, with

great force and clearness, this error; and in drawing the plain line of distinction between those who owed a public duty and those who did not, sustained the inherent natural right of the private trader to do every act and make every agreement, from the doing or making which the appellants are, by this decree, restrained.

The court said:

(312). "Railroad companies are instruments of commerce, and their business is commerce itself." * * *

(313). "To exclude agreements as to rates by competing railroads for the transportation of articles of commerce between the states would leave little for the act to take effect upon."

(320). "The trader or manufacturer, on the other hand, carries on an entirely private business, *and can sell to whom he pleases*; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or unreasonable; *he may make such discrimination in his business as he chooses, and he may cease to do any business whenever his choice lies in that direction.*"

(322) "*The (railroad) company may not charge unreasonable prices for transportation, nor can it make unjust discriminations, nor select its patrons, nor go out of business when it chooses, while a mere trading or manufacturing company may do all these things.*"

(336) The language of Judge Shiras, of the Court of Appeals, is quoted with approval when he says:

"By reason of this marked distinction existing between enterprises inherently public in their

character and those of a private nature, and further by reason of the difference between private persons and corporations engaged in private pursuits, who owe no direct or primary duty to the public, and public corporations created for the express purpose of carrying on public enterprises, and which, in consideration of the public powers exercised in their behalf, are under obligations to carry on the work intrusted to their management primarily in the interest and for the benefit of the community, it seems clear to me that the same test is not applicable to both classes of business and corporations in determining the validity of contracts and combinations entered into by those engaged therein."

(326) "It is readily seen from these cases that if the act do not apply to the transportation of commodities by railroads from one state to another or to foreign nations, its application is so greatly limited that the whole act might as well be held inoperative"—referring to *Kidd vs. Pearson* and *E. C. Knights* case. It will also be readily seen from these cases, as well as the one in which the last quoted comment is made, that the theory of the bill and of the decree, which involves sustaining the jurisdiction of the federal government and its courts to control, regulate, reform, correct and manage from the bench all business and trade associations and exchanges, of the same general character as the Traders Live Stock Exchange—has invariably received the pointed condemnation of this court.

It remains to consider the points of the decree wherein appellants are "enjoined from enforcing, recognizing or acting under" their rules Ten (10), Eleven (11), Twelve (12) and Thirteen (13).

(1) Rule Ten (Rec. p. 34, Specification VII)

is: "This Exchange will not recognize any yard trader unless he is a member of the Traders Live Stock Exchange."

(2) Rule Eleven (Rec. p. 35, Specification VIII) is: "When there are two or more parties trading together as partners, they shall each and all of them be members of this Exchange." That is, clearly, if one member of a partnership desires to become a member of the Exchange, all of his partners must do so, otherwise he is not eligible: all must become members or none.

(3) Rule Twelve, amended (Record p. 30, Specification IX) is: "No member of this Exchange shall employ any person to buy or sell cattle, unless such person hold a certificate of membership in this Exchange."

These three rules, constituting elements of an agreement voluntarily entered into by appellants, were evidently designed to encourage all persons engaged in the same occupation, who believed in the purposes of the preamble (Rec. p. 32) to become members, or, as was stated (id.) by the president of appellant Exchange, "it was meant and intended that those yard traders who did not approve of the objects of the association, and of concerted action to obtain them, might go their independent way, but the Exchange would not countenance them nor be responsible for their methods." It resulted, naturally enough, that some refused to join and two parties formed, one friendly and the other hostile to the organization. Those who refused to join unquestionably had that right, and some of them acted wisely, as it appears (Rec. p. 30) that they probably could not have remained members, and certainly could not unless they altered their methods of operation.

It was thought and is contended on behalf of appellants, that being a voluntary association of men engaged in private trade, they owe no duty to any yard trader to recognize him; that they have a lawful right, each in attending to his own business, to recognize whom they please, and may "select their patrons," and may wholly or partly "cease to do any business when their choice lies in that direction;" and that they could exercise these rights without being guilty of restraining inter-state commerce, within the meaning of the penal act under which they are charged.

But the court, by enjoining them from "enforcing or recognizing or *acting under*" Rule 10, virtually commands them to "recognize" the other yard traders, that is, presumably, deal and trade with them, whether appellants wanted to do so or not, and holds the rule an agreement within the prohibition of the statute, and "acting under" it a restraint on inter-state commerce.

It was thought and is contended that this voluntary association of traders had the right to prescribe among themselves such conditions of eligibility to membership as they pleased, and as might be acceded to by those joining; that they were not bound to number among their members any person whose business partnership and possible business interest might lead him to act in hostility to the purposes and interests of the association; that they were not bound to extend the privilege of membership to one who might, through the medium of his partners, not members, conduct business in a manner not admitted as proper or honorable by the rules of the Exchange; that they owed no duty to admit anybody to membership except such as they chose; that any yard trader was left to his free choice of joining under the conditions or not; and finally, that they could impose

the condition of membership contained in Rule 11, without being guilty of a violation of the statute.

But the court decreed that they had no right to adopt this rule, and in doing so they entered into an agreement in restraint of inter-state commerce.

It was thought, and is contended, that the appellants, being private traders, each had a right in the conduct of his own business to employ anybody or nobody as he pleased; that he was not bound and did not owe the duty, as a matter of law, to employ anybody; that he could employ whom he pleased; that he had a right to agree with his associates to employ as buyer or salesman only members; that appellants were not bound, as a matter of law, if any of them employed a buyer or salesman, to take an outsider as such employee, who might be inimical to the interests and purposes sought to be promoted by the association, and friendly to, or even of the number of, its enemies; and finally, that in agreeing not to do this they deprived no one of any right and were not guilty of violating the statute.

But the court held that this agreement made them guilty, and enjoined them from "enforcing *or recognizing or acting under*" this rule; which seems logically tantamount to *a command not to employ anyone except non-members.* Doubtless this was not intended, but the strenuous terms of the decree show that the court felt that the law required and could compel these traders, each and all, to conduct their private business "the same as if such traders' association did not exist," and that the superintending authority to see that each member did this, was vested in the court by the Act of July 2nd, 1890. These rules are put under the ban, evidently, from the same basic and fundamentally erroneous conception, to which we

have referred and which permeates the whole decree, that peaceable discrimination by free choice in favor of a fellow member is a wrong instead of a right; that each member owes the duty to every rival trader not to withhold his patronage from that rival, or from anyone else who would thereby be induced to take his custom away from the rival and bestow it on such member. This is denied by the warrant of the reasons and authorities heretofore cited, and by many others, the citation of which might emphasize, but could not strengthen the positions assumed by appellants in this controversy. If the circuit court was right, then every member of every religious, fraternal or benevolent association, every member of every trades union and business association, who bestowed his patronage on his brother, *because* he was his brother, would be a violator of the statute, provided the dealing concerned the purchase of an imported article of commerce.

(4) Rule 13 (Rec. 35, Specification X) deserves separate notice. It reads: "*No member of this Exchange shall be allowed to pay any order buyer or salesman any sum of money as a fee for buying cattle from or selling cattle to such party.*"

In support of this rule we cite the authority of the Bible and the code of morality. It is a rule against bribery. That is its full scope and purport. Its terms are plain and free from any ambiguity. Its legality is not assailed anywhere in the record, except in the decree, nor specifically defended anywhere, except in the Assignment of errors. The record, however, discloses abundantly the facts which make its explanation and application easy to appreciate. It will be borne in mind that the trader is, alternately, a buyer and

seller on his own account, and when he has cattle to sell the "order buyer" is his customer. The latter, as his designation indicates, has orders to buy on the market for his principal, whose money he spends when buying. The trader offers to sell at a certain price, and when he accompanies it with a fee as an inducement to the agent to pay the price (with his absent prinicpal's money) he is guilty of the villainy which the rule prohibits. The agent, whose duty it was to buy at the best price possible, is thus bribed to pay the price asked. Reverse it. The trader is a buyer on the local market and customer of the salesman, who, this time as a selling agent, represents the shipper. The trader offers a price lower, of course, than that asked, and if he bribes the agent of the absent and ignorant owner to sell at the lower price, the second offense condemned by the rule is committed. The salesman, whose duty it was to sell for the best price obtainable, has his bribe in his pocket, and no one is robbed except the shipper.

It cannot be that the able and upright Judge who enjoined appellants from "enforcing or recognizing *or acting under*" this rule, understood it; and it may be that error in the decree in this respect will be confessed.

III.

The decree is violative of the rights secured by the Fifth Amendment to the Constitution of the United States forbidding that any person be deprived of liberty or property without due process of law; and if the act of July 2nd, 1890, is correctly construed by the Circuit Court, it is itself violative of said amendment.

It will be understood that the contention is not that the statute is unconstitutional, but that

if the acts and agreements of the appellants constitute in fact a violation of the statute within its true meaning, then it is unconstitutional, because the right to do those acts and agree to those rules of association is a right which, under the constitution, it is beyond the power of the Federal government to take away. It will be borne in mind also that the appellants, "and each and every of them," are enjoined from doing said acts or "enforcing, recognizing or acting under" any of the proscribed rules. A contempt of the decree, therefore, would be a matter of individual guilt. To charge or establish an offense against the statute, the acts and facts must be the same, whether the proceeding be by bill in equity, as here, or by indictment; acts and facts which, within the meaning of the law, constitute guilt are essential to sustain either proceeding.

According, then, to the interpretation put upon the statute by the Circuit Court, these results must follow:

(*a*) If a member refuses to recognize a yard trader who is not a member—that is, refuses to deal or negotiate with such party because a non-member—he is guilty of contempt of court, and also may be indicted, convicted and punished for restraining inter-state commerce. (Rule 10).

(*b*) If he agrees with his associates upon the qualification for membership, that no individual of a firm can become a member unless all do, or if he joins in rejecting an application for membership because the party is ineligible under this rule, he is, in either case, guilty. (Rule 11).

(*c*) If he employs a fellow member to buy or sell cattle for him, and the reason resident in his

mind for so doing is that the employee is a member, he is guilty. (Rule 12).

(*d*) If he refuses to employ a non-member as buyer or salesman, and such refusal is due to the fact that the party is a non-member, he is guilty.

(*e*) If he joins in enforcing, or recognizes or acts under Rule 13, forbidding bribery of the agent of the other party to a trade, he is guilty. (This is doubtless a mistake but is part of the decree).

(*f*) If he joins in enforcing any of these rules against any of his fellow members who have agreed to and violated them, he has offended and is guilty.

(*g*) If, in his dealings, he in any way discriminates in favor of a fellow member because of their association, or against anyone not a member for the reason that he is not a member, whether by peaceful bestowal of favors and custom on his brother, or the withholding of the same from those hostile to the Exchange or otherwise; or if he withholds his custom from any commission merchant, for the reason that such merchant patronizes non-members of the Exchange, leaving the merchant to his free choice of enjoying the custom of whichever he prefers—in any such case he is a criminal.

In the foregoing hypotheses we have sought to state with accuracy every essential act and fact which in the estimation of the circuit court would constitute a restraint of inter-state commerce and a consequent violation of the statute on the part of appellants. It has been seen that in the view taken, when the offence consists of discrimination in

dealing, or employing men, a necessary ingredient of the crime, is a particular reason for the act of discrimination. We mention it again solely for the purpose of pointing out, that a recognition of the existence of the *power* in the courts or in congress to declare an act of discrimination by a private trader criminal, when done for a particular reason, though innocent and even praiseworthy if the same act be done for some other reason, must carry with it the recognition of the power in one or the other branch of the government to declare that act criminal when done for any other reason obnoxious to the notions of judge or legislator.

"Questions of power," says Chief Justice Marshall, in *Brown vs. Maryland*, "do not depend upon the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed."

Under the theory of this decree, the natural right of a person following his private occupation "to select his patrons," to make such discriminations by way of withholding or bestowing patronage as he may deem best for his own interest, to employ whom he pleases, to "refuse to deal," and cease to do business "when his choice lies in that direction"—that right is subject in its exercise to control, regulation, abridgement or destruction at the will of congress. We deny it.

We affirm, on the contrary, that the right of the appellants to do each and all of the things which they are forbidden to do, and to refuse to do those things which they are enjoined from refusing to do, is covered by the protecting shield of the constitution, and stands beyond the rightful reach of the legislative or judicial hand.

It should be observed that there is no question here of criminal combination or conspiracy, except as it may be made so by this statute; no claim in

the bill of the existence of facts constituting common law conspiracy; no violence, intimidation, combination to compel others to break contract relations, or any threats of such; nothing, in short, like "combining to do an unlawful act, or a lawful act by unlawful means," according to the universsably accepted rules of the common law. Consequently, if the acts and agreements enumerated and adjudged to be violations of the act of July 2nd, 1890, are in truth so, within the meaning and intent of that statute, it must be because they were thereby first made *mala prohibita*; they were not crimes before. This cannot be done without depriving appellants of liberty or property without due process of law.

1. *The right to be untrammeled and unmolested in the conduct of their private business, so long as they do not interfere with the equal rights of others, is a part of that constitutional liberty.*

In *Munn vs. Illinois*, 94 U. S., 123, Mr. Chief Justice Waite said: "It (the constitutional provision in question) is found in Magna Charta, and in substance, if not in form, in nearly or quite all the constitutions that have been adopted from time to time by the several states of the Union. By the fifth amendment it was introduced into the constitution of the United States as a limitation upon the powers of the national government, and by the fourteenth as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislature of the states."

This word "liberty" as it occurs, sometimes in state constitutions, and in the fifth amendment, limiting federal power, and in the fourteenth, guarding and guaranteeing it against possible encroachments by local legislation, has been

defined with great unanimity, and jealously defended with almost equal vigilance by the supreme state and federal courts. It will be sufficient for the purposes of this contention to cite and quote briefly from a few of many of these decisions.

In *Kuhn vs. Common Council*, 70 Mich., 534 (537), the court said: "The right to contract a debt or other personal obligation is included in the right to liberty; and the right to contract a debt, or to enter into a bond or other writing obligatory, is also a right of property"—this in a case where a city enactment made a liquor dealer incompetent to sign as surety the bond of another liquor dealer.

In *State vs. Goodwill*, 33 W. Va., 179 (183), it is said: "It is equally an encroachment, both upon the just liberty and rights of the workman and his employer, or those who might be disposed to employ him, for the legislature to interfere with the freedom of the contract between them, as such interference hinders the one from working at what he thinks proper, *and at the same time prevents the other from employing whom he chooses.*"

(Id.) "The avocation of an employer, as well as that of his employe, is his property. Depriving the owner of property of one of its attributes is depriving him of his property, under the provisions of the constitution. The right to use, buy, and sell property and contract with reference thereto, including contracts for labor—which is, as we have seen, property—is protected by the constitution."

In *Godcharles vs. Wigeman*, 113 Pa. St., 431, the court held certain sections of the act un-

der consideration unconstitutional and void, "inasmuch as by them an attempt has been made by the legislature to do what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the rights of the employer and of the employe; more than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that propose to prevent his doing so, is an infringement of his constitutional privileges, and consequently vicious and void."

In *State vs. Loomis*, 115 Mo., 307, Chief Justice Black, speaking for the court, said (p. 316): "Liberty, as we have seen, includes the right to contract as others may; and to take that right away from a class of persons following lawful pursuits, is simply depriving such persons of a time-honored right which the constitution undertakes to secure to every citizen."

In *Ritchie vs. The People*, 155 Ill., 108, Mr. Justice Magruder, speaking for the court, said (104): "The privilege of contracting is both a liberty and property right. Liberty includes the right to acquire property, and that means and includes the right to make and enforce contracts. The right to use, buy, and sell property and contract in respect thereto, is protected by the constitution."

(Id. p. 108) "But aside from its partial and discriminating character, this enactment is a purely arbitrary restriction upon the fundamental right of the

citizen to control his or her own time and faculties. It substitutes the judgment of the legislature for the judgment of the employer and employee in a matter about which they are competent to contract with each other. It assumes to dictate to what extent the capacity to labor may be exercised by the employee, and takes away the right of private judgment as to the amount and duration of the labor to be put forth in a specified period." The above, where by a statute of Illinois, women were prohibited from being employed to work or from working more than a specified number of hours per day or week.

In re Jacobs, 98 N. Y. 98, it is stated (p. 105): "It is plain, therefore, that this law interferes with the profitable and free use of his property by the owner or lessee of a tenement house who is a cigar-maker, and trammels him in the application of his industry and the disposition of his labor, and thus, in a strictly legitimate sense, it arbitrarily deprives him of his property, and of some portion of his personal liberty."

(Id. p. 106) "So, too, one may be deprived of his liberty and his constitutional rights thereto violated without the actual imprisonment or restraint of his person. Liberty in its broad sense, as understood in this country, is not only freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights, which limit one in his own choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (ex-

cept such as may be passed in the exercise by the legislature of the police power, which will be noticed later) are infringements upon his fundamental rights of liberty, which are under constitutional protection."

In *People vs. Gillson*, 109 N. Y., 389, the court, speaking by Judge Peckham, said (99): "It is quite clear that some or all of these fundamental and valuable rights are invaded, weakened, limited, or destroyed by the legislation under consideration. *It is evidently of that kind which has been so frequent of late, a kind which is meant to protect some class in the community against the fair, free and full competition of some other class, the members of the former class thinking it impossible to hold their own against such competition, and, therefore, flying to the legislature to secure some enactment which shall operate favorably to them or unfavorably to their competitors, in the commercial, agricultural, manufacturing or producing fields.* * * * A person engaged as a retailer of coffee might very well think that he could greatly enlarge the amount of his trade by doing precisely what was done by the defendant in this case, and that while his profits on the same amount of coffee would be smaller than if he gave no present, yet by the growth of his trade his income at the end of the year would be more than by the old method. This statute, if valid, steps in to prevent his adopting such a course to procure trade, and from it to secure an income and livelihood for himself and family. He is thus restrained in the free enjoyment of his faculties, which he ought to have the right and liberty to use in the way of creating or adopting plans for the increased growth of his trade, business or occupation, unless such restraint is necessary for the common welfare * * *

(*Id.* 400). That power (the police power) has never yet been fully described, nor its extent plainly limited, further, at least, than this: It is not above the constitution, but it is bounded by its provisions; *and if any liberty or franchise is expressly protected by any constitutional provision it cannot be destroyed by any valid exercise by the legislature or executive of the police power.*"

(Page 401) "I refer to that case (*In re Jacobs*, *supra*), as authority for the statement that the legislature cannot, without reason and arbitrarily, infringe upon the liberty or the property rights of any person within the protection of the constitution of this state; and that if the legislature shall determine what is a proper exercise of the police power, its decision is subject to the scrutiny of the courts."

(Page 406) "Nor can this act stand as a valid exercise of legislative power to enact what shall amount to a crime. The power of the legislature to so declare is exceedingly large, and it is difficult to define its exact limit. * * * The power has been unlawfully exercised in this instance for the same reasons we have already stated, because it violates the constitutional provision which secures to each person in this state his liberty and property, except as he shall be deprived of one or both by due process of law."

Judge Cooley (6th Ed. Constitutional Limitations, p. 475) says: "The right of every man to do what he will with his own, not interfering with the reciprocal rights of others, is accepted among the fundamentals of our law."

In *Munn vs. Illinois*, 94 U. S., 142, Mr. Justice Field gave a definition of the term "liberty,"

as used in the constitutional provision, which, though in a dissenting opinion, in no wise conflicted with the expressed views of the majority of the court: "By the term liberty, as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness."

In *Caldwell vs. Texas*, 137 U. S., 697, Chief Justice Fuller, speaking for the court, says: "Due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice." The plain converse of which is that any decree or statute which subjects the individual to such exercise of power, in violation of those "established principles of private right," is not "due process of law."

Mr. Justice Miller, in *Pumpelly vs. Green Bay Co.*, 13 Wall., 177, speaks of a constitutional provision "*as placing the just principles of the common law on that subject beyond the power of ordinary legislation to control them*," and as having "*always been understood to have been adopted for protection and security to the rights of the individual against the government.*"

In *Allgeyer vs. Louisiana*, 165 U. S., 578 (588), the court, by Mr. Justice Peckham, said: "It is natural that the state court should have remarked that there is in this 'statute an apparent interference with the liberty of defendants in restricting their rights to place insurance on property of their

own whenever and in what company they desired.' Such interference is not only apparent, but it is real."

After referring to the holding of the state Supreme Court that there was no such interference and the statute was valid and had been violated, the justice said: "As so construed, we think the statute is a violation of the federal constitution, in that it deprives the defendants of their liberty without due process of law. The statute which forbids such act does not become due process of law because it is inconsistent with the provisions of the constitution of the union. The liberty mentioned in that amendment means not only the right of the citizen to be free from the mree physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

The uniformity of doctrine with which the courts uphold the rights and liberty of the citizen under this constitutional provision, the brief but comprehensive recognition by this court in the *Trans-Missouri Freight* case, construing this very act, that almost every right here claimed still exists, can lead to but one conclusion: That the liberty of the appellants, within the meaning of the amendment, is by this decree stricken down "without due process of law."

2. *Appellants are deprived of "property" by*

the decree, or by the statute, if it means what the circuit court construed it to mean.

In a broad but real sense, as the cases show, the privilege of the citizen to be free to follow his vocation unmolested, and "to employ his faculties in all lawful ways" for the improvement of his condition, is itself property. But in a more literal, if not more important, sense membership in a business exchange is, and has been adjudged to be, property of a most valuable character. Since the patent purpose of this decree, as its concluding words import, is to compel traffic to be carried on at this market "the same as if said traders' association did not exist," it is manifest that the value of membership must be destroyed, and that the principle upon which this adjudication proceeds would, if applied, annihilate millions of dollars' worth of property rights in business exchanges of a similar kind throughout the United States. It is not the purpose to discuss this matter further. To do so would be superfluous, and the attempt inadequate, in view of the full and valuable information on the subject furnished the court, with such unexampled research and accuracy, by counsel in their brief for appellants in the cognate case of *Hopkins vs. United States*, now pending for hearing. We simply call attention to the fact that by the decree, or by the statute, if correctly construed in the decree, valuable rights of property are destroyed without due process of law.

3. *The rights here claimed of liberty and property are not inconsistent with the equal or reciprocal rights of others, and are, therefore, within the protection of the constitutional provision.*

From what has been said and cited under the

second point, and so far under the third, the soundness of this proposition is apparent. The exchange is a *voluntary association*, and the members adopted the plans indicated by its rules *for the government of their own conduct in private trade*, and not for the government of the conduct of anybody else. These members are free to submit to the discipline of the organization, or to decline to do so, and withdraw and adopt the course of the rival unorganized class. If they choose to follow the rules agreed upon in the disposal of their personal patronage and custom, that is the inherent right of each, and does not interfere with the equal rights of others to deal when and where they choose. Those not members are free and have an equal right to form a voluntary association of their own or not; to deal or trade with whom they please; to refuse to deal for any reason satisfactory to themselves; and, in short, to make such discrimination in the unrestricted disposal of their trade as they see fit, without being accountable to the government, for the reason which actuates them in doing these things. The commission merchant, alternately selling to and buying from the trader, is likewise exempt from trammel and restriction in the exercise of his choice in dealing. If, by the independent action of members or non-members of this Exchange, he cannot have the trade of both, but must take his choice between them, he will naturally solicit the trade which, in his judgment, is most desirable and profitable to himself and those he represents. He is not entitled, as matter of law, to the trade of either class.

Without this decree, all these three classes of citizens engaged in business on this market have their "liberty" within the meaning of the constitution as uniformly construed; but the decree

steps in, and its mandate says, in effect, to the appellants and each of them: "You shall not adopt the plan of organization nor deal in your own unbridled discretion, for thereby you gain an advantage over your trade rival, and it eventuates that you prosper more than he does—it results that others whose trade both you and he solicit prefer to deal with you, and this cannot be tolerated."

Was it ever so held in the Republic before? To paraphrase the apt language of the supreme court of New York in *Gillson's case*, the decree protects one class of traders "from the fair, free and full competition" of another class; "the members of the former class thinking it impossible to hold their own against such competition," fly to the law officers of the government to secure a decree of injunction, "which shall operate favorably to them, or unfavorably to their competitors, in the commercial field."

4. *What the federal government may do as to inter-state traders, the local government may do as to local traders.*

The "liberty" of the fifth amendment is the "liberty" of the fourteenth and of the state constitutions. Individual rights in the conduct of domestic commerce are as much within the grasp of the power of state legislation as those rights in the conduct of inter-state commerce are within the power of congress. If the theory of this decree is a sound construction of the statute, then it is competent for the local legislature in the same way to regulate and control the private dealings of those engaged in internal trade; and by force of national and state authority together, "discrimination," or free choice in trading, is permanently enrolled in the catalogue of crimes. Members of labor organ-

izations, whose right to make a brother's cause their own, and separately or together "to cease to do any business when their choice lies in that direction" has always been fully recognized by the courts, so long as they themselves recognized the equal right of the employer "to select his patrons" and employ whom he chooses; members of the various industrial, social, religious, fraternal and other of the multitudinous associations which so much abound—when their favor is given "because of such membership," sought and refused "because of such non-membership"—may find in the omnipotence of this power to create a crime out of a reason, the destruction of their liberty for any reason which the caprice of the law making mind may suggest.

We are confident that the principle will not be sustained which, in its logical scope, would subject industrial millions to "legislative tutelage," big with the power of oppression, and to "governmental paternalism," most enervating and destructive to individual enterprise; and that constitutional rights of action, hitherto unchallenged, will not be put under the control of judicial leading-strings, to be pulled at the discretion of the *nisi prius* courts of the country.

(All italics used are ours).

RECAPITULATION.

These points, it is submitted, are established by reason and authority:

1. That appellants are not engaged in interstate but local trade, and the character of their association it is not within the jurisdiction of the federal courts to consider in this proceeding.

2. That regardless of the trade engaged in, whether inter-state or local, the acts which they are enjoined from doing do not, and could not, in their nature, restrain inter-state commerce within the meaning of the statute.

3. That the agreements or rules which appellants are enjoined from enforcing, recognizing or acting under do not render the exchange a combination, agreement or conspiracy in restraint of inter-state commerce within the meaning of the statute, and are of concern only to the members and not to their competitors or to the public.

4. That the appellants, and each of them, have the inherent right to do what is forbidden by the decree, and to refuse to do what the decree in effect commands.

5. That the decree deprives appellants of liberty and property without due process of law, and if it correctly construes the Act of July 2nd, 1890, that statute is unconstitutional.

IV.

It follows that, for the errors specified, the decree should be reversed and the cause remanded, with directions to the circuit court to dismiss the bill.

R. E. BALL,
With whom are I. P. RYLAND and
JOHN L. PEAK,
Solicitors for Appellants.